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REPORTS OF CASES
DETERMINED IN
THE DISTRICT COURTS OF APPEAL
OF THE
STATE OF CALIFORNIA

C. P. POMEROY
REPORTER
RANDOLPH V. WHITING
ASSISTANT REPORTER

VOLUME 25

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DISTRICT COURTS OF APPEAL.

FIRST APPELLATE DISTRICT.

THOS. J. LENNON, Presiding Justice.

FRANK H. KERRIGAN, Associate Justice.

JOHN E. RICHARDS, Associate Justice.

SECOND APPELLATE DISTRICT.

N. P. CONREY, Presiding Justice.¹

WALTER W. MIDDLECOFF, Presiding Justice.²

W. P. JAMES, Associate Justice.

VICTOR E. SHAW, Associate Justice.

THIRD APPELLATE DISTRICT.

N. P. CHIPMAN, Presiding Justice.

ELIJAH C. HART, Associate Justice.

ALBERT G. BURNETT, Associate Justice.

¹ Elected, November 3, 1914.

² Elected, November 3, 1914, to fill the unexpired term of the Hon. Matthew T. Allen, deceased, from November 3, 1914 to January 4, 1915.

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[Crim. No. 323. Second Appellate District.—June 18, 1914.]

THE PEOPLE, Respondent, v. NEILS SVENDSEN,
Appellant.

CRIMINAL LAW—ROBBERY—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.—In this prosecution for robbery the evidence is sufficient to support the verdict of guilty.

Id.—RESTRICTION BY COURT OF CROSS-EXAMINATION—WHETHER PREJUDICIAL TO DEFENDANT.—In such prosecution the trial court might properly have allowed the defendant greater latitude in the cross-examination of the prosecuting witness than it did, but it cannot be said that the record discloses that the defendant's rights were prejudiced by the limitation placed on such cross-examination.

Id.—CROSS-EXAMINATION OF WITNESS—CONTROL BY COURT—REVIEW ON APPEAL.—The control of the cross-examination of a witness, and the permitting of leading questions to be asked of one's own witness, is largely in the discretion of the trial judge, and unless there is an abuse in the exercise thereof and the rights of the defendant are prejudiced thereby, the action of the lower court should not be disturbed on appeal.

Id.—CROSS-EXAMINATION OF ACCUSED—EXTENT TO WHICH SHOULD BE PERMITTED.—Where the life or liberty of one accused of an offense depends upon the uncorroborated evidence of the prosecuting witness, the ends of justice will be best subserved by permitting the right of a full investigation to be thrown upon the transaction, which, other than his own statement, in the absence of the direct evidence elicited by the district attorney, can be done only on cross-examination of the witness. The policy often pursued by district attorneys in proving the bare facts and then objecting to questions calculated to illuminate the subject involved, asked by the accused, upon the ground that they are not proper cross-examination, is

not to be commended; and the trial judge, who is supposed as between the accuser and the accused to sit impartially, should, notwithstanding the limited scope of the direct examination, grant to the defendant the fullest opportunity for cross-examination and inquiry as to direct statements made against him by his prosecutor.

ID.—PROCEDURE IN CRIMINAL CASE—DUTY OF TRIAL COURT TO SEE THAT DEFENDANT IS ACCORDED EVERY RIGHT.—So long as the present system of criminal procedure prevails, and particularly since the adoption of section 4½ of article VI of the constitution, under which, notwithstanding a defendant has by a ruling of the court been deprived of a legal right in his trial, he is nevertheless, on appeal, without remedy, unless the appellate court can say upon the entire evidence that such error has resulted in a miscarriage of justice, a greater and larger responsibility rests upon the trial judge in seeing that a defendant on trial is accorded every right to which he is entitled; otherwise a legal wrong is done under judicial sanction for which the aggrieved is without remedy.

ID.—ADMISSIONS OF DEFENDANT—ADMISSIBILITY IN EVIDENCE.—Admissions made by the defendant to the arresting officer, which are not confessions of guilt, are admissible in evidence without any preliminary foundation being laid.

ID.—INSTRUCTIONS AS TO REASONABLE DOUBT—MODIFICATION—WHETHER ERROR.—The modification of an instruction that, if after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is his duty "not to vote for a verdict of 'guilty' nor" not to be influenced into voting for the single reason that a majority of the jury should be in favor of a verdict of guilty, by striking out the quoted words, is not error.

ID.—MISCONDUCT OF COURT TOWARD DEFENDANT'S COUNSEL—WHETHER PREJUDICIAL ERROR.—While the trial court in this case might have expressed its rulings in a manner indicative of less impatience and less calculated to affect the sensibilities of the defendant's counsel, it cannot be said, in the absence of prejudicial error, that this alone was sufficient to prejudice the rights of defendant. Such action on the part of the court merely accentuates prejudicial error exhibited by the record.

APPEAL from a judgment of the Superior Court of Los Angeles County. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

Frank A. McDonald, and Nathaniel R. Rutherford, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

SHAW, J.—Defendant was convicted upon an information charging him with the crime of robbery. He appeals from the judgment alone.

On the night of August 2, 1913, defendant, who had been to the city of Los Angeles, alighted from a suburban electric car at a point near the town of Whittier, from which point he started to walk to the farm where he was employed as a dairyman. On the same car was a Chinaman, Sing Lee, who was also traveling from Los Angeles to his place of employment as a farm laborer near Whittier and distant about one mile from the point where both he and the defendant left the electric car at the same time. In going to their respective places of employment, both defendant and Sing Lee on foot and together traveled the same road. When they had reached a point about a quarter of a mile from the camp where Sing Lee was employed, and at about 12:15 o'clock on the morning of August 3rd, a fight ensued wherein defendant, as conclusively shown, inflicted upon the Chinaman some forty to fifty knife wounds, a number of which were dangerous and as a result of which Sing Lee was left in a disabled and semi-conscious condition in which he was found several hours later by persons traveling the thoroughfare. There were no witnesses other than the parties to the encounter and their versions as to who was the aggressor and other material facts are conflicting. According to Sing Lee's testimony, defendant, without provocation, suddenly attacked him by grasping his throat, holding his knuckles against his vocal cords, and, saying, "God damn, no likee me," began using a knife on him until, disabled from his numerous wounds, he fell to the ground, when defendant searched his pockets, taking therefrom a purse containing \$4.05, and left him. Defendant testified: "This Chinaman met me on the boulevard, and he says, 'Where do you live'? I told him it was none of his damn business. He said, 'What is the matter with you'? I says, 'Don't bother me; I ain't got no use for Chinamen; cheap labor.' And about that time he pulled out a knife and struck me on the forehead with the knife, and we had quite a fight there on the boulevard. I got the advantage of him and took his knife away from him and give him quite a beating"; but that he did not go through his pockets, nor take any money from, nor rob him; that Sing Lee first struck

him in the forehead with a knife; whereupon he took the knife away from the Chinaman and struck him once or twice; that in taking the knife he took hold of the blade, cutting his hand. There was some corroborative evidence that defendant had a cut on his hand.

It is apparent that the jury in reaching a verdict believed the testimony of the Chinaman, to the effect that the defendant robbed him of the purse containing the money. Defendant's story, in view of the fact that when found the next morning Sing Lee had forty or fifty knife wounds in his body, that he took the knife from Sing Lee who was the aggressor and struck him with it once or twice only, was well calculated to cause the jury to discredit his entire testimony. It was the province of the jury to determine the fact, as to which the evidence was conflicting. Hence there is no merit in the contention that the evidence was insufficient to support the verdict of conviction.

On direct examination Sing Lee testified: "He (the defendant) took from me a pocketbook containing four dollars and five cents." On cross-examination, after stating that he had this purse in his trousers pocket, he was asked: "Did the defendant put his hand in your pocket and take your purse from your pocket?" The judge, without waiting for an objection to be interposed or answer given, interrupted, saying: "He has answered that," to which defendant's attorney replied: "Not that question," in reply to which the learned judge said: "Yes, he has. I will sustain an objection and make it myself. We have got to get through here some time. The next question, if you have got another one, Mr. McDonald." The witness stated the trousers he had on were those worn at the time of the robbery, and that while he was in the hospital the nurse took them to the laundry, having them cleaned. He was then asked: "Is that the only person that has ever had your trousers in their possession or cleaned them since the 2nd day of August?" to which the court sustained an objection upon the ground that it was immaterial. He was also asked: "Who lives with you on this ranch?" Whereupon, no objection being interposed, the court said: "That is not proper cross-examination." An objection was also sustained to a question as to whether he had been spending the night in Chinatown and what he had been doing. The control of the cross-examination of a wit-

ness and the permitting of leading questions to be asked of one's own witness, is largely in the discretion of the trial judge, and unless there be an abuse in the exercise thereof and the rights of defendant prejudiced thereby, the action of the court should not be disturbed. The witness, if we may determine from the record, had not stated in terms, as said by the court, that defendant put his hand in his pocket and took therefrom his purse, and, conceding that he had, he might very properly have been permitted to answer the question. Doubtless he would have given an affirmative answer, since by reason of its being in his pocket he could not have obtained it otherwise, except by forcing Sing Lee to take it from the pocket and hand it over to him, in which case the act would have constituted the offense charged. Hence, conceding the ruling of the court to be error, it must likewise be conceded that it was not prejudicial to the substantial rights of defendant. The other questions to which objections were sustained appear to have been immaterial. The answers, whatever they might have been, could not have had the slightest effect upon the question at issue. The same remarks apply with equal force to a number of like assignments of error based upon rulings in the admission and rejection of evidence. While we think the court might properly have allowed defendant greater latitude in the cross-examination of the prosecuting witness, it cannot be said the record discloses that defendant's rights were prejudiced by the limitation placed thereon. In this connection it may be said generally, however, that where the life or liberty of one accused of an offense depends upon the uncorroborated evidence of the prosecuting witness, the ends of justice will be best subserved by permitting the light of a full investigation to be thrown upon the transaction, which, other than his own statement, in the absence of direct evidence elicited by the district attorney, can only be done on cross-examination of the witness. The policy often pursued by district attorneys in proving the bare facts and then objecting to questions calculated to illuminate the subject involved, asked by the accused, upon the ground that they are not proper cross-examination, is not to be commended; and the trial judge, who is supposed as between the accuser and the accused to sit impartially, should, notwithstanding the limited scope of the direct examination, grant to defendant the fullest

opportunity for cross-examination and inquiry as to direct statements made against him by his prosecutor. So long as the present system of criminal procedure prevails, and particularly since the adoption of section 41½ of article VI of the constitution, under which, notwithstanding a defendant has by a ruling of the court been deprived of a legal right in his trial, he is nevertheless, on appeal, without remedy, unless this court can say upon the entire evidence that such error has resulted in a miscarriage of justice, a greater and larger responsibility rests upon the trial judge in seeing that a defendant on trial is accorded every right to which he is entitled; otherwise a legal wrong is done under judicial sanction for which the aggrieved is without remedy.

One of the officers who made the arrest of defendant was called as a witness for the people and testified as to certain statements made to him by defendant at the time when placed under arrest. After the district attorney had asked certain preliminary questions, the witness was told to repeat the conversation had with defendant. Thereupon the following proceedings were had:

"Mr. McDonald: Just a moment. Was this conversation had—

"The Court: You are not cross-examining.

"Mr. McDonald: For the purpose of objection—

"The Court: "Well, I don't care anything about that. You will get your chance when the time comes."

And again, when the witness was asked to repeat another talk had with defendant, his attorney, addressing the court stated: "For the purpose of objecting, I would like to ask the witness one or two questions."

"The Court: I think not."

As we gather from appellant's brief, his complaint is that the admissions made by defendant to the officer in the conversation had with him constituted confessions, and as such were inadmissible in evidence for want of proper foundation laid. Assuming the statements made by defendant, as testified to by the witness, were confessions, we think a sufficient foundation was laid to entitle them to admission as evidence. Moreover, an examination of the statements made by defendant in the conversations to which the witness testified clearly shows that they were not confessions of guilt; indeed, noth-

ing that he said could be so construed. For this reason it was not necessary to make the proofs required as a prerequisite to introducing a confession in evidence. (*People v. Wilkins*, 158 Cal. 530, [111 Pac. 621]; *People v. Weber*, 149 Cal. 325, [86 Pac. 671]; *People v. Stokes*, 5 Cal. App. 211, [89 Pac. 997].)

Certain instructions to the jury requested by defendant were refused, or given as modified. Where such instructions were refused the subject thereof appears to have been fully and fairly covered by other instructions given. Hence, conceding the instructions requested to have been correct and applicable to the case, nevertheless the rights of defendant could not have been prejudiced by the refusal to give the same. Of the requested instructions given as modified, the changes therein appear to have been by running a line through such portion as was elsewhere given, or by the court deemed improper. As so modified, the instructions, taken with those given, were correct, full, and fair statements of the law applicable to the case. Assuming that defendant was entitled to the instruction that, "if after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror not to vote for a verdict of 'guilty' nor not to be influenced into voting for the single reason that a majority of the jury should be in favor of a verdict of 'guilty' " the failure to give which, however, has been repeatedly held not error; (*People v. Loomer*, 13 Cal. App. 660, [110 Pac. 466]; *People v. Singh*, 20 Cal. App. 150, [128 Pac. 420]; *People v. Fisher*, 16 Cal. App. 271, [116 Pac. 688]), the modification thereof by striking out the part underscored left the instruction complete and unobjectionable, the jurors being correctly told that the fact that a majority of their number favored a verdict of guilty should not in itself influence any one of them who entertained a reasonable doubt as to defendant's guilt to so vote. It is also claimed the defendant's rights were prejudiced by permitting the jury to take these instructions so modified to the jury-room, an inspection of which disclosed the parts thereof so stricken out. There is nothing in the record showing that the instructions were so delivered to the jury.

Assignments are made of misconduct on the part of the court, it being claimed that the manner in which the rulings were made showed hostility to counsel for the defendant in the method in which he presented his client's case, and tended to humiliate counsel and prejudice the cause of defendant. Some of the rulings upon which appellant bases his claim are hereinbefore stated. Many of the questions asked by defendant's counsel were immaterial and of the most trivial nature, and while doubtless he was defending his client to the best of his ability, nevertheless his conduct of the case was calculated to try the patience of the court. While the court might have expressed its rulings in a manner indicative of less impatience and less calculated to affect the sensibilities of defendant's counsel, it cannot be said, in the absence of prejudicial error, that this alone was sufficient to prejudice the rights of defendant. As said by this court in an opinion filed June 10th, in the case of *People v. Costa*, 24 Cal. App. 739, [142 Pac. 508], such action on the part of the court merely accentuates prejudicial error exhibited by the record. (*People v. Szafcsur*, 161 Cal. 636, [119 Pac. 1083]; *People v. Casselman*, 10 Cal. App. 238, [101 Pac. 693]; *People v. Modina*, 146 Cal. 142, [79 Pac. 842].)

Counsel for appellant cites section 4½ of article VI of the state constitution, to the effect that no judgment in a criminal case shall be set aside for error unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the errors complained of have resulted in a miscarriage of justice. In compliance with appellant's request, we have read this provision which, however, is not, as indicated by counsel, entirely new to us, and we have likewise carefully read the record, and are convinced that it discloses no error which will justify this court in holding there has been a miscarriage of justice. Appellant's counsel have filed voluminous briefs, a large part of which is not devoted to a discussion of alleged errors contained in the record, but to the fact that defendant, a white man, has been convicted upon the uncorroborated testimony of a "heathen Chinaman" (and other matters wholly foreign to the questions presented for review), and insist that the laws of the state permitting such an outrage should be changed. The labor of the court would have been greatly lessened had counsel devoted their

time to a discussion of the alleged errors contained in the record.

The judgment herein is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 17, 1914.

[Crim. No. 492. First Appellate District.—June 22, 1914.]

THE PEOPLE, Respondent, v. JOE DE MARTINI,
Appellant.

CRIMINAL LAW—PANDERING—INFORMATION CHARGING CRIME IN LANGUAGE OF STATUTE.—An information for pandering is sufficient if it charges the offense in the language of the statute, and states the place where it was committed.

ID.—PARTICULAR HOUSE OF PROSTITUTION—NECESSITY OF ALLEGING.—It is unnecessary for the information to show the particular house of prostitution of which the woman was induced to become an inmate.

ID.—COMMISSION OF CRIME IN TWO COUNTIES—VARIANCE BETWEEN INFORMATION AND EVIDENCE.—If the information alleges the commission of the crime in one county, while the evidence shows that the crime was committed partly in that county and partly in another, there is no fatal variance.

ID.—CHARACTER OF HOUSE—PROOF BY REPUTATION.—In a prosecution for pandering the character of the house involved may be proved by reputation, under the general rule that the character of a house of prostitution may be established by evidence of its reputation as such.

ID.—AMENDMENT OF SECTION 315 OF PENAL CODE—EFFECT ON ADMISSIBILITY OF EVIDENCE OF REPUTATION OF HOUSE.—The amendment of 1905 to section 315 of the Penal Code, to the effect that in all prosecutions for keeping houses of prostitution "common repute may be received of the character of the house" and the "purpose for which it is kept and used," does not exclude such evidence in other cases.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. George H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

Nathan C. Coghlan, and B. I. Bloch, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Assistant Attorney-General, for Respondent.

KERRIGAN, J.—The defendant was charged by information with the crime of pandering, committed in the city and county of San Francisco, in that he did willfully and feloniously, and by promise of a salary of thirty-five dollars per month, and by other devices, cause, induce, persuade and encourage a certain woman (naming her) to become an inmate of a house of prostitution. He was tried, convicted, and sentenced. The appeal is from the judgment and from an order denying defendant's motion for a new trial.

The information charges the offense in the language of the statute, stating also the place where it was committed, and in fact every other element necessary to constitute the completed crime, defendant's contention to the contrary notwithstanding. The offense designated is what is termed generally a statutory crime, and it was sufficient to describe it in the charging part of the paper in the words of the statute. (*People v. Gordon*, 133 Cal. 328, [85 Am. St. Rep. 174, 65 Pac. 746]; *People v. Frigerio*, 107 Cal. 151, [40 Pac. 107].)

It was unnecessary for the information to show the particular house of prostitution of which the woman was induced to become an inmate.

While the information alleges that the crime was committed in the city and county of San Francisco, the evidence shows that it was committed partly in that and partly in another county. This did not constitute a variance between the information and the evidence. The offense having been committed partly in each of two counties, it was sufficient, we think, under the terms of section 781 of the Penal Code, to allege the venue as was done, and to show by the evidence that the crime was partly committed in the county designated. That section reads: "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

The court correctly received evidence of the reputation of the house in question, for it may be said that the rule, though not universal, is well established that the character

of a house of prostitution may be established by evidence of its reputation as such. (*De Martini v. Anderson*, 127 Cal. 33, 37, [59 Pac. 207]; *People v. Nitta*, 17 Cal. App. 152, [118 Pac. 946]; *State v. Hoyle*, 98 Minn. 254, [107 N. W. 1130]; *State v. Smith*, 29 Minn. 193, [12 N. W. 524]; *State v. Bresland*, 59 Minn. 281, [61 N. W. 450].) Counsel for the defendant seems to attach some significance to the fact that the legislature in 1905, [Stats. 1905, p. 668], in amending section 315 of the Penal Code, provided that in all prosecutions for keeping houses of prostitution, "common repute may be received of the character of the house" and the "purpose for which it is kept and used"—the argument being that the legislature having expressed in what cases such evidence may be admitted, has excluded it from all others. The maxim here relied upon is applied as a means only of discovering the legislative intent, and is never permitted to defeat the purpose of the legislature when the purpose is otherwise plain. (Black on Interpretation of Laws, p. 219; 36 Cyc. 1122.) At the time this amendment was enacted, the better rule as to the admission of this sort of evidence was—and it still is—that it is admissible; but, doubtless, at that time, being one of judicial construction and not being universal, was lacking in the element of certainty; and therefore for the purpose of making the rule definite as to the class of cases then under consideration, section 315 of the Penal Code was amended in the particular stated. But there is nothing in the amendment indicating that the legislature intended that the rule then announced should apply only to that class of cases; nor is there any reason why the amendment should be given this limited construction. (Black on Interpretation of Laws, 222.) It will be noted that the case of *People v. Nitta*, 17 Cal. App. 152, [118 Pac. 946], was decided after the amendment; and there it was held that the general reputation of a certain premises as being a house of prostitution was admissible.

The criticism of the instructions of the court to the jury is not well founded, and does not require consideration.

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 21, 1914.

[Civ. No. 1229. Third Appellate District—June 23, 1914.]

MARIA SOPHIA KOSKELA, as Administratrix of the Estate of Matt Gabriel Koskela, Deceased, Respondent,
v. ALBION LUMBER COMPANY (a Corporation),
et al., Appellants.

NEGLIGENCE—ACTION FOR DEATH OF STEVEDORE—COURSE OF EMPLOYMENT—ACCIDENT OCCURRING WITHIN.—In this action to recover for the death of a stevedore, he having gone ashore for supper from the vessel on which he was working, and having, on his return to the vessel to resume work, been drowned by being precipitated into the sea through the breaking of the "traveler" connecting the vessel with the wharf, it is a fair inference from the evidence that his contract of service included the transportation to and from the vessel by means of the "traveler," and that he was in the course of his employment when the accident occurred.

ID.—ACCIDENT TO EMPLOYEE—DOCTRINE OF RES IPSA LOQUITUR.—There being no contention that the employee was at fault, and the evidence showing that the thing which caused the accident was under the exclusive control of the defendants, and that the accident was such as in the ordinary course of events would not have happened had the defendants used proper care, the rule of *res ipsa loquitur* applies, a presumption of negligence arises against the defendants, and a motion for nonsuit is properly denied.

ID.—RES IPSA LOQUITUR—MEANING OF RULE OR MAXIM.—Under the rule of *res ipsa loquitur*, when a thing which caused an injury without fault of the injured person is shown to have been under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of explanation, that the injury arose from the defendant's want of care.

ID.—JOINT LIABILITY OF OWNERS OF SHIP AND OWNERS OF LUMBER COMPANY FOR DEATH OF STEVEDORE.—If the vessel was being loaded with lumber, and the lumber company had loaned the stevedore to the shipowners to assist in the loading, and the "traveler" was in part owned by the lumber company and in part by the owner of the ship, and was jointly operated by and for their joint benefit, both are liable for the death of the stevedore, in the absence of evidence tending to show that the accident happened by reason of the fault of one only of them.

ID.—SPECIAL VERDICT—WHETHER NECESSITATES JUDGMENT FOR PLAINTIFF.—The contention of the defendants in this case that the special verdict of the jury necessitates a judgment in their favor, inasmuch

as it affirmatively appears therefrom that the plaintiff did not prove to the satisfaction of the jury that the defendants' negligence caused the stevedore's death, is not tenable.

ID.—GENERAL VERDICT—EFFECT AS IMPORTING FINDING FOR PLAINTIFF.

A general verdict for the plaintiff and against the defendants imports a finding in favor of the plaintiff on all the averments of the complaint material to his recovery.

ID.—PRESUMPTIONS IN CASE OF GENERAL AND SPECIAL VERDICTS.—All presumptions are in favor of a general verdict for the plaintiff, and it must control if a special verdict is not absolutely irreconcilable therewith. On the other hand, answers to interrogatories cannot be aided by intendment, as all intendments are in favor of the general verdict.

ID.—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.

The trial court did not commit reversible error in this case in denying the defendants' motion for a new trial on the ground of newly discovered evidence; the granting or denying of the motion being within the sound discretion of the court, and its action not being ground for reversal except when such discretion is abused.

APPEAL from a judgment of the Superior Court of Mendocino County and from orders refusing to vacate the judgment and refusing a new trial. J. Q. White, Judge.

The facts are stated in the opinion of the court.

Mannon & Mannon, for Appellants.

M. H. Iversen, and Preston & Preston, for Respondent.

CHIPMAN, P. J.—Action for damages resulting from alleged negligence of defendants through which plaintiff's intestate lost his life.

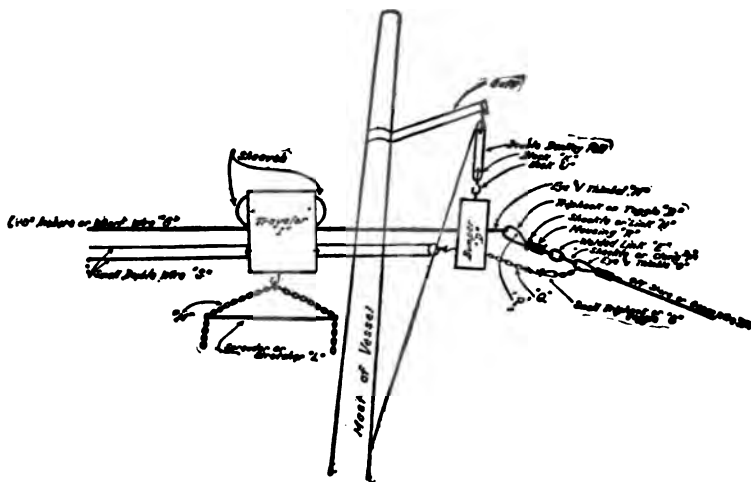
General and special demurrers to the amended complaint were overruled and defendants answered denying the material averments of the complaint alleging negligence and pleaded in defense unavoidable accident; that defendants had no knowledge of any defects in the appliances which it is alleged had been carefully inspected prior to their use and that the "accident was a casualty which no act of the defendants could have foreseen or prevented, and was caused through the breaking of a metal device of the loading apparatus, through a latent, unknown, undiscoverable defect in the metal thereof."

The jury rendered a general verdict and also a special verdict, as follows: "I. Did the wire cable give way by reason

of any defect in it? Answer: Don't know. II. If so, what defect? Answer: Don't know. III Did the wire cable give way by reason of any defect in the machinery or appliances by which it was supported? Answer: Yes. IV. If so, what defect? Answer: Don't know. V. Did the wire cable give way by reason of the careless or negligent manner in which the machinery or appliances supporting it were adjusted? Answer: Yes. VI. If so, in what way were the appliances or machinery carelessly and negligently adjusted? Answer: The jury does not think that the evidence locates the defect that caused the accident."

Three appeals are prosecuted: 1. From a judgment in favor of plaintiff and against both defendants in the sum of ten thousand dollars. 2. From an order refusing to set aside the judgment and enter a judgment in favor of defendants on the special verdict rendered; and 3. From an order denying defendants' motion for a new trial. The evidence is brought up on bill of exceptions.

A diagram was used at the trial which we find necessary to an understanding of the facts in the case and is here inserted in this opinion:



The general statement of the case found in appellants' opening brief is conceded by respondent to be substantially correct "for the purpose of getting the case before the court." We shall avail ourselves of this statement to some extent.

The defendant Albion Lumber Company has been for many years engaged in the operation of a sawmill at Albion in Mendocino County. As a part of its plant it owns and operates what is known as a "wire chute" at the end of a wharf by means of which a vessel lying off the wharf can be loaded with lumber or other forest products. At the time of the accident here in issue, the other defendant, Swayne & Hoyt, had under charter and was operating the steamer "Fulton" and by contract with Albion Lumber Company was transporting lumber and ties from Albion to other points. This "wire chute" is a device by which a wire cable is suspended between the wharf and the vessel to be loaded and on this cable runs a "traveler" (I) from which is suspended the load to be transported between the wharf and the ship (L-M). The traveler is drawn back and forth by means of a steam donkey engine located on the wharf.

The cable, traveler, engine and, in fact, everything belonging to the chute is the property of the Albion Lumber Company with the exception that the "falls" and "tackle" (J-K) by which the seaward part of the chute is raised and lowered is the property of the vessel which is then being loaded. The "main wire" (G) on which the traveler runs is really two cables joined together at the ship with a "toggle" or "hook" (B). The offshore end of the main wire (A) is permanently moored in the harbor and when not in use this part of the wire rests on the bottom.

On January 17, 1911, the steamer "Fulton" came into Albion harbor and went "under the wire" to load. Her crew, all employees of Swayne & Hoyt, drew up the offshore wire from the bottom and, by means of a running line, pulled out the main wire from the wharf and then joined the two ends of the wire together by means of the toggle (B) which was permanently attached to the free end of the offshore wire. As a part of making this wire fast the vessel's crew "moused," i. e., tied with small rope, the tongue of the tripper or toggle hook (B).

The loading of the vessel then proceeded by means of the chute and continued during the seventeenth day of January and all day of the eighteenth. At all times the employees of Albion Lumber Company had charge of the shore end of the wire and the employees of Swayne & Hoyt had charge of the vessel end thereof and attended to the storing away

of the cargo. Matt Gabriel Koskela, plaintiff's intestate (hereafter referred to as Koskela), had been working in the lumber yard of the Albion Company and in its employ. On the morning of the 17th, however, the master of the "Fulton" found himself short of stevedores and he therefore, with the permission of the Albion Company, employed Koskela in that capacity and the latter went to work on the "Fulton" in the employ of Swayne & Hoyt about noon on the 17th and continued in that employ until the accident.

About 5:30 P. M. on the 18th Koskela and another stevedore, called Jack Paavanen, having been working on the "Fulton" all day came ashore for supper. They reached the shore by riding on the traveler across the wire chute, as was the custom in going ashore and returning to the vessel. After these men came across, the wharf man slackened the main wire between the wharf and ship, so that it dropped to the bottom and another steamer which was lying at the wharf backed over the bight of the wire and then put out to sea. After this was done, the wharf foreman, Byrne, set the wire tight by pulling it up again and put it in a position to carry loads over to the vessel. He then ran the traveler out with no load more than half way to the ship in order to test the wire, and then ran it back to the wharf. In the mean time, Koskela and Paavanen had gotten their supper and returned to the wharf, as it was proposed to continue loading that evening.

When the wharf foreman gave the signal that everything was ready, Koskela and Paavanen took their places on the traveler to be transported back to the ship. The traveler was started out and when it had gone half way or a little less, the main wire dropped and caused the traveler with the two men to fall into the ocean. Paavanen was rescued but Koskela was drowned.

An examination of the apparatus after the accident showed that the triphook or toggle (B) holding the main wire together was entirely gone, together with the link (E) by which it had been fastened to the shackle in the end of the offshore line. The triphook and link disappeared either by falling into the water, as contended by appellants, or was thrown overboard by someone on the vessel to conceal their defects, as suggested by respondent. This triphook (B) was a massive contrivance more than twenty-six

inches long and the link at its offshore end was made of material one and a half inches in diameter. The operation of the triphook (B) can be understood from the diagram if it is remembered that there is a hinge in it just where it bears against the eye and thimble (N). Unless the tongue (P) is fastened down with the link or shackle (H) the triphook will open and no longer hold the apparatus in position.

This action was brought against the two corporations to recover damages because of Koskela's death. The amended complaint alleges that Koskela's "death was caused by the negligence of said defendants committed as follows: . . . the said wire cable by reason of the defects in the machinery and appliances by which the same was supported and by reason of the careless and negligent manner in which said machinery and appliances were adjusted, gave way and the deceased without fault on his part was . . . instantly killed. That said death of said deceased was the direct consequence of the defective and imperfect appliances and machinery of defendants and the negligent and careless manner in which same were used and adjusted as above set forth, which said defects were well known to the defendants and each of them and were unknown to the plaintiff. The said defendants ordered the deceased to undertake said journey to said vessel, well knowing that the said machinery and appliances for taking him there were defective, insecure, unsafe and dangerous and also well knowing that said machinery was adjusted in a careless and negligent manner."

Witness, George Olsen, called by plaintiff, was at the time the Albion Lumber Company's foreman on the wharf. He testified, in explanation of the operation of the apparatus, that when not in use the entire offshore wire from the thimble "N" and including the links of the small chain "Q," were dropped into the sea and rested at the bottom. "When the steamer is unloading and you trip the wire, this is untripped first (witness here indicates on diagram hook marked 'C') and this block (witness here indicates block marked 'D') and the little wire ('S') goes ashore, then you trip the big wire and the trip and this whole thing (witness indicates wire and trip marked 'A' 'B') goes overboard. The end of this wire marked 'A' is under water too." He testified further that two or three months before the accident he assisted in

overhauling the apparatus. He testified: "It was my duty to see that the rigging was in good order. These two wires (offshore wire 'A' and inshore wire 'G') are fastened together in this way: You pull the inshore wire out to the boat and raise it up and slip that triphook ('B') through the eye ('N') of the inshore wire. After putting that link marked 'H' on there they place a 'mousing' on outside that. I don't know whether that was done on that day of the loading of this vessel. I did not consider it a part of my duties to see whether that was fastened together right or not. On the day the steamer began to load I didn't fasten it, I was not aboard the boat. . . . We had some trouble with a part of the wire or the rigging of the vessel on the day before the accident." Over defendants' objection he was permitted to explain the trouble: "The hook and this block here (indicating on diagram hook marked 'J') gave way and dropped the wire out aboard the vessel while the traveler was out there, and split the woodwork on this traveler here. . . . This block here (indicating block marked 'K') belonged to the steamer; it is used to hoist the wire up and down and this hook and block both here (indicating 'J' 'K') that belongs to the steamer but the block there (indicating block marked 'D') belongs to the wire. It was this hook here on this block (marked 'J') which broke." He testified that the next morning they began to load the vessel; ran the traveler out to see that it would work; did not examine to see whether the hook arrangement belonging to the vessel had been fixed; there might have been some little sling trouble at the vessel the day of the accident but he was not certain. He testified that he went aboard the vessel about a half an hour after the accident and found the end of the inshore wire uncoupled from the offshore wire at the connection with the triphook or toggle "B," and "hanging in the rigging of this thing—right in the rigging (indicating on diagram point marked 'J') . . . and the eye of this wire was right here in this block (indicating on diagram point marked 'D'). The weight of this inshore wire would naturally pull it toward the shore. . . . The offshore wire was not there at all. This bumper ('D') was hanging right over the vessel. I did not find anything with reference to this triphook (marked 'B'). Something was said about looking after it. I did not look for the offshore end of the wire or the coupler at this time of night." It appeared that when Kos-

kela started to return to the vessel it was at the hour of about 7 P. M. and it was quite dark and "raining slightly." He testified that he proposed to look for the coupler. "Q. Who did you propose it to? A. To the captain. Q. How was it you didn't look? A. Because the captain said it was too dark and did not want to look for it." The foregoing questions and answers were given over defendants' objection. "I did not hear any statement made by the captain as to what had become of the coupler." He testified that he examined the outside or offshore wire the next morning and found nothing on the end except the shackle or clevis "F." "The rest was gone," i. e., "B" "E," from that point to the eye or thimble at the end of the inshore wire. He was not certain whether the tripper "C" was there. The shackle or clevis "F" was not broken and nothing on it showed a strain. "Nobody dragged the ocean or sent any divers down to find that hook. I didn't look for it. I didn't see anybody else look for it. I have not seen the coupler since the accident." He explained that the office of the little chain and tripper "C" was to hold the strain from the traveler "I." He got all of this chain and the tripper after the accident but "could not tell whether it was on the end of the inshore or outshore wire. He also testified that the "mousing" ("R") was rope wound around the shackle "H" "and is always put on when you put the wire out. Every time you put the wire out it is customary to put on new mousing."

Witness Paavanen (Pavnen) was Koskela's companion and was on the traveler with Koskela when the latter was drowned. They had gone ashore for supper and were, as directed to do by the captain of the vessel, returning to continue the work that night. His description of the accident is not material. He testified that during the day he worked, the 18th, "something broke about the rigging of the vessel." Over objection he was permitted to describe what happened. "This pulley broke off (indicating on the diagram marked 'K') and this whole thing (indicating traveler, bumper and wire tripper) broke down into the hold of the vessel and broke the framework and then they had to fix it. Q. Did that break let the wire down? A. Yes, sir. I do not remember what time of day this break was but I thought it was in the forenoon. It was a couple of hours before they fixed it up. . . . After they fixed it we loaded more lumber or ties that day. I am

also positive that it was the same day that I fell into the ocean. While they were fixing this traveler, they uncoupled the two wires. They had a rope around here in this block (indicating mousing on diagram.) Somebody took a knife and cut the rope off and then lifted this hook (indicating point 'B') and unhooked it. I didn't see him put this rope back. I didn't see them couple the wire back. I don't know whether they put the rope back on it or not. . . . They were hauling about fifty ties at a load across there on that day. Ties weigh from 100 to over 200 pounds. They were not carrying any load at the time Koskela and I got on the traveler. . . . There was nothing on the traveler to carry except we two men."

Witness Johnson was working "longshore" on the "Fulton" and saw "the wire go down" at the time of the accident. He testified: "I know what shape the coupler part that couples the two wires together was in that day. It was in good shape and was tied. I don't know whether it was tied at the time of the accident. At the time I jumped out of the way. . . . All of the crew was around there when I jumped. I did not see this coupler after the wire fell. The wire didn't go quite overboard, the whole thing stood on top of the railing. I didn't see the offshore wire. I didn't look or help them look for the end of the wire that night. I didn't help them look for the coupler. I didn't hear anybody say anything about the coupler. I didn't hear the captain say anything about this machinery or any part of it but when we was loading he told us to keep out of the way, that is all he said. He told us to keep out of the way, 'it ain't very safe around the load,' that is all I heard him say—that it was not very safe around there." He testified that he saw the captain go ashore on the wire and return with the load a dozen times that day. "He told us it would not be safe every time he was aboard the ship. When he was not there the mate told us. He never mentioned what was the matter. Neither the mate nor anybody else ever told us what was the matter." On cross-examination he testified: "When a load of ties goes out there on the steamer and as it goes over the vessel it swings back and forth considerable. It always does. It is sure dangerous to stand around in the way of that and have it strike you." On re-examination he testified: "The captain and the mate surely made an examination of the rigging of the vessel in my presence while I was there that day. I don't

know how many times they did that. . . . He didn't say it would not be safe while he was looking at that but while he was running loads. He said the same thing every time but he didn't tell me what it was that would not be safe."

Plaintiff rested her case at the close of Johnson's testimony and defendants moved for a nonsuit which was denied. The motion presents certain questions which may as well be decided at this point as elsewhere. The grounds of the motion were: That the evidence does not show that Koskela was in the employ of either of defendants when the accident occurred; that it does not tend to prove negligence of either of the defendants or that deceased in the course of his employment was directed by defendants or either of them to get upon the traveler; or that the cable gave way by reason of any defects therein; or that it gave way by reason of any defect in the appliances or in the negligent manner of operating the machinery; or that there were any defects in the machinery or its adjustment.

There was evidence that the deceased was told by the captain of the vessel to return after getting his supper; that the traveler was used for transporting the workmen and that when deceased returned from his supper to the wharf and the cable was ready for use the lumber company's foreman said to deceased and his companion, Pavnien: "Hurry up and get on that traveler." It is true that there is no evidence that deceased was under pay while at his supper or while he was returning on the cable. Strictly speaking, he may not have been at the time in defendants' employment. But we think it a fair inference from the evidence that the contract of service included transportation to and from his place of work by the very means through which he lost his life and we think that the same rule should apply as would have been applicable if, without fault of his, he had been injured by the breaking of the cable while at work on the vessel. And that brings us to the question whether the circumstances thus far disclosed afforded reasonable evidence of want of care on defendants' part sufficient to require explanation by them. The rule or maxim, *res ipsa loquitur*, is stated as follows: "When a thing which caused the injury without fault of the injured person is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care,

it affords reasonable evidence, in the absence of explanation, that the injury arose from the defendant's want of care." (*San Juan Light & Transit Co. v. Requena*, 224 U. S. 89, 99, [56 L. Ed. 680; 32 Sup. Ct. Rep. 399]; *Hill v. Pacific Gas & Elec. Co.*, 22 Cal. App. 788, 790, [136 Pac. 492].) It is not contended that deceased was at fault and it seems to us that the undisputed facts show that the thing which caused the injury was under the exclusive control of the defendants and that the injury was such as in the ordinary course of things would not have occurred had defendants used proper care. The appliances for loading vessels were such as were in ordinary use and, presumably, had been adopted by defendants as proper and suitable for the purpose designed. It is inconceivable that defendants would have adopted these means had they supposed that in the ordinary course of their operation, with proper care, such accidents as the one here were likely to occur. It is not necessary to refer to the many and great variety of cases in which the rule has been applied, to show that the present case comes plainly within its operation.

Nor have we any doubt upon the remaining question presented by the motion—namely—whether or not defendants were jointly liable, if liable at all.

Appellants contend that "the rule *res ipsa loquitur* does not and cannot apply, for the reason that there cannot, under any view of the evidence, have been a joint liability by the defendants and the evidence leaves it impossible to determine which if either defendant is liable."

The appliances used were in part owned by the lumber company and in part by the shipowners. All of these parts constituted the means of transportation and were necessary to each other. It was also necessary that both parties should assist in the operation of the appliances, and they were jointly operated by and for the joint benefit of both defendants. In the absence of evidence tending to show by one of the parties that the accident happened by reason of the fault alone of the other for which the former was in no sense responsible, we think it must be held that both were liable.

Appellants cite *Harrison v. Sutter St. Ry. Co.*, 134 Cal. 549, [55 L. R. A. 608, 66 Pac. 787]. In that case the injury was to a passenger riding on a street car and was caused by its colliding with a brewery wagon belonging to the National

Brewing Company. Both companies were made defendants and the contention was that, under the rule of *res ipsa loquitur*, a presumption of negligence arose against both parties. The court, speaking of this principle, said: "In the very nature of things it cannot be made to apply in favor of a plaintiff seeking to recover damages for injuries against two defendants wholly independent of each other, it being an open question as to which defendant had control of the particular instrumentality that caused the injury." Appellants, in their quotation, omit to add the further statement of the court: "If it were a conceded fact in such a case" (or, we may add, appeared from the evidence) "that the instrumentalities of both defendants caused the injury, probably the principle could be applied, but not otherwise." The undisputed evidence was that this very situation existed in the present case. The motion for nonsuit was rightly denied.

Captain Jacobson, master of the steamer "Fulton," was called by defendants and testified that he assisted in adjusting the appliances aboard ship. "When we got this tripper up on deck I was right there and saw all of it and there was no visible defect. That tripper did not go back in the water between that time and the time the accident happened. We didn't load any more that night." He testified that "once the hook up above gave way" and also "the chain (marked 'Q' on diagram) that takes the strain of the carriage"; these "were fixed and we kept on loading." He testified that he had to wait for the steamer "Pomo" to go out and he told deceased and Pavnen to go and get their supper; that the bumper and the whole business was sent ashore and the in-shore wire was let down to the bottom of the sea and the "Pomo" went out over the wire. "I was on deck when this was done. Then we started up again. We sang to them on shore to heave tight the big wire and then after that we got out the small line. . . . Then we rigged up our single and double donkey falls, the big wire was there already. We did the same as we had done before except that we had the main wire ashore." He saw the bumper sent out part way and then went into his room. "I was in my room at the time this accident happened. I went out immediately and when I got out there I found this here (indicating bumper and end of in-shore line on diagram) hanging shoreward from the deck. I found all the rigging except that none of the offshore wire was

on the vessel. I think the water there is somewhere around three or four fathoms deep." He testified that George Olsen was not there that night and that no one came from the wharf that night. Olsen's testimony is already given to the contrary. He testified that the next morning they got up the offshore line and there was nothing on it but the thimble or eye (marked "O" on diagram). "The tripper and the link and everything was gone, there was nothing left but just this tymbal" (properly called thimble). He explained that all his then crew were elsewhere employed at the time of the trial and none of them testified except the captain. Concluding his testimony in chief, he said: "We didn't examine the tackle of the ship; that we took for granted was O. K. The tackle was hooked up on that day, if it was hooked up properly (properly). I was over the wire myself on the day of the accident I should think a dozen times. I rode back and forth, out on the load and back empty."

On cross-examination he testified: "It was customary for the employees and longshoremen to go back and forth on this traveler; that is the way they always did." He denied that the "mousing" was cut that day or that the wires had been separated and claimed that the breaking of the bumper and hook was the day before. The only explanation given by the witness as to his theory of what caused the accident was on his cross-examination and was as follows: "The night this man was drowned that link must have broken" (indicating link marked "E" on big tripper) and his reason given was—"because the tripper was not there. . . . I didn't make any investigation to see which way the triphook fell over. No one saw it. I didn't see the triphook. I don't know which side it went over on. If it had fallen in the boat I would have seen it." He denied telling any of the men that the machinery was not safe. He told them when a load came out "to stand clear." He testified: "There was nothing the matter with any machinery such as the traveler or the dumping block that I knew of. . . . It had been about thirty hours since I examined the mousing. . . . It is the universal custom on all of these chutes for the vessel to make fast the two wires. We have no assistance at all in making it fast. We have men enough to do it ourselves."

Witness Byrne was called by defendants. He was the engineer handling the inshore end of the wire. He testified that

they had trouble with the bumping block the day before the accident but he didn't know of any other trouble. He was told by Olsen to send the longshoremen out; he tested the wire after the "Pomo" went out. "After I brought the traveler back and the two got on I started my engine—threw my clutch in and ran probably a third of the way out or possibly half of the way when everything dropped." He explained that he had a rope or yarn tied around the wire to indicate when he had the wire taut. "When everything dropped I thought my mark might have slipped or something so I examined that the first thing and found it where it belonged. It showed the main wire was not too tight. Of course, in setting that wire up it is difficult at night and we go by that mark."

On cross-examination he testified: "The weight of an ordinary load of ties on the carriage would be probably three ton, from two to three tons, and at the time these men were out there was nothing at all on there except the two men. There was no reason that I know of why the toggle should break. Everything was in good order as far as I knew. There was no particular weight to these men to make it break when it had held up big loads before."

Pavnen was recalled for cross-examination and testified that it was the evening before the accident that "the mousing on the big tripper" was cut and that both he and Koskela worked there on the 17th and 18th.

Witness McKee testified for defendants as an expert in operating wire chutes. His testimony related to chutes at other places and the custom in their operation. We cannot see that his testimony throws any informing light on the case here. Of the wire chutes with which he was familiar he said: "It is not an unusual thing for some part of the rigging to carry away."

Olsen was recalled and stated that it was the bumper and not the traveler that broke the night before the accident and that the main wire was tripped that night. Witness Miller gave some expert testimony in rebuttal as to the proper construction of these wire chutes but we do not think it important to state his opinions.

We have endeavored to give so much of the testimony, perhaps more than necessary, as would fairly present the salient facts in the case.

Reviewing the facts as shown by the testimony, we start with the presumption of negligence, i. e., that, under the rule *res ipsa loquitur*, there was reasonable evidence that the injury arose from the defendants' want of care. This alone, without considering specific facts indicating negligence, of which respondent claims there are many, would sustain the general verdict in the absence of satisfactory explanation by defendants of the cause of the injury exculpating them from responsibility therefor. And the sufficiency of the facts constituting such explanation was for the jury to determine. It is difficult to conceive of appliances that had during the day carried safely many loads of two or three tons weight suddenly, without fault of the operators or of the appliances themselves, breaking down under a load of three hundred pounds. If the accident was susceptible of an explanation consistent with the assumption that the appliances were adequate and their operation by defendants without fault the burden was upon defendants so to show to the satisfaction of the jury. The only member of the vessel's crew who testified was the master, Captain Jacobson, and in his testimony in chief he made no explanation whatever of the cause of the accident. In his cross-examination the only suggestion made by him of a probable cause was that the "link must have broken (indicating point marked 'E' on diagram) because the tripper was not there." It is possible that this link broke, if it did break, by engineer Byrne's having put a tension on the main wire to the breaking point when he sent the deceased out on the traveler. He was guided by a mere rope tied around the cable which at first he thought had slipped, thus leading him to put too great a strain on the cable. It is not improbable that unwittingly he did this. However, it is not for us, nor was it for the jury to speculate upon the cause of the breakdown. It was for defendants to make the explanation and this, we think, they failed to do.

Appellants contend: "That the special verdict of the jury necessitates a judgment in favor of defendants, inasmuch as it affirmatively appears therefrom that the plaintiff did not prove to the satisfaction of the jury that the defendants' negligence caused Koskela's death."

There was a general verdict for plaintiff and against defendants. The rule is that the general verdict imports a finding in favor of plaintiff on all the averments of the com-

plaint material to his recovery. (*Merritt v. Wilcox*, 52 Cal. 238, 242.) "The presumption is that the general verdict covers findings in plaintiff's favor upon all the facts necessary to be proved under the issues not covered by the findings." (Clementson on Special Verdicts, p. 135.) And all presumptions are in favor of the general verdict for the plaintiff and it must control if the special verdict is not absolutely irreconcilable therewith. (*Antonian v. Southern Pacific Co.*, 9 Cal. App. 718, 731, 732, [100 Pac. 877].) On the other hand, answers to interrogatories cannot be aided by intendment, as all intendments are in favor of the general verdict. (Clementson on Special Verdicts, p. 134.) And a special finding must be limited and controlled by its specific terms. (Id.) Special verdicts cannot control a general verdict unless consistent with each other, are not uncertain and are free from obscurity. They cannot destroy the general verdict, if at all, except by their own inherent strength and clearness. (Id., p. 135.) Obviously, as the general verdict is an express finding for plaintiff on all material issues it should not be overthrown unless the special findings are utterly at war with it. We have seen that the jury were warranted in finding the defendants guilty of negligence from which the injury resulted. We do not think it affirmatively appears from the special verdicts that plaintiff did not prove that defendants' negligence caused Koskela's death. *Res ipsa loquitur*. Special interrogatories I and II were not answered and need not have been because plaintiff was not required to locate the particular defect in the wire cable. The jury did answer that the cable gave way by reason of defects in the machinery or in the appliances supporting it. (Interrogatory III.) But it was not required of the jury specifically to locate the defect. The jury also found that the wire gave way by reason of the careless and negligent manner in which the machinery or appliances supporting it were adjusted. (Interrogatory V.) These were findings of negligence and respondent, we think, pertinently remarks: "Does this not exclude the idea of latent or undiscoverable defect? If the cause lay in the negligent manner in which this machinery was adjusted, the cause could not be a latent or undiscoverable defect. Negligent adjustment is not a latent defect." Interrogatory VI invited an answer in what way were the appliances or machinery negligently adjusted? The answer

must be limited to the scope of the question which called for an explanation by the jury of the specific defect in the manner of adjusting the appliances which caused the accident. This the jury were unable to do. As shown, the happening of the accident under the circumstances and the death of deceased without his fault resulting therefrom established defendants' negligence. The jury found specifically that the cable gave way by reason of a defect in the machinery and appliances supporting it and also by reason of the negligent manner in which they were adjusted. We must, if we can, under the rules stated, so construe the failure to answer interrogatory VI, as to be consistent with the answers just referred to. Besides, we do not think any inconsistency arises between this answer and the general verdict and the specific answers III and IV; nor, in our opinion, was an answer locating the defect necessary to the giving of full force to the general verdict.

We find no prejudicial error in any rulings of the court on the admission of evidence.

The motion for a new trial was further urged on the ground of newly discovered evidence and was supported by the affidavit of John Tietjen, mate of the steamer "Fulton" at the time of the accident. His affidavit shows that he was present and assisted in adjusting the appliances and operating them. It is in greater detail and in some respects more specific than the testimony of Captain Jacobson, but is quite similar and, while corroborative and in that sense important, it was in large degree cumulative. He does not explain the cause of the accident nor does he state facts which if believed would necessarily rebut the evidence of negligence. He states that he "would have attended the trial on July 11, 1912, if he had had notice." Affiant Moran, manager of Swayne & Hoyt, deposed that he was notified, on June 24, 1912 (the case was set on June 20), that the case had been set for trial July 11, 1912, and that he immediately "set about procuring Tietjen's attendance" and traced him aboard the steamer "San Pedro," June 30, 1912, bound from San Francisco to Eureka and finally succeeded in obtaining information from the San Pedro's agent that she would arrive at San Francisco on July 9th and that he, the agent, would employ a substitute mate, relieve Tietjen and send him to Ukiah on the 10th; that affiant relied on this promise and notified the defendants'

attorneys that Tietjen would be at Ukiah on July 10th, not later than the 11th. It turned out that the "San Pedro" did not arrive at San Francisco until July 18th. No application was made to postpone the trial for the reason, as deposed by attorney Mannon, that he could not assure the court that he would be able to secure Tietjen's attendance nor state where he was.

Attorney Preston, one of plaintiff's attorneys, deposed that the cause was at issue in February, 1912, and the case was called up to be set for trial about March 11th and was set down for trial for April 25th but on April 8th the order was vacated and the cause regularly continued from week to week to be reset until May 27th when the trial date was fixed for June 27th and at the request of defendants the cause was again postponed until July 11th at which date the trial began; "that no application for a postponement was made on said last named day or at any other time. That John Tietjen does not reside in the county of Mendocino nor did he reside at a place where he could be forced to attend trial by subpoena." There is no reason given why Tietjen's deposition was not taken except as may be inferred from the fact that Mr. Mannon was notified by Swayne & Hoyt that all the witnesses, including Tietjen, would be in attendance.

The granting of the motion, under the circumstances, was within the sound discretion of the court and it is only where such discretion has been abused that its order will be reversed. (*People v. Urquidas*, 96 Cal. 239, [31 Pac. 52].)

Tietjen's evidence cannot be said to be newly discovered. It was well known to the defendants that he was present and acting as mate of the "Fulton" when the accident happened. Knowing as early as March that the cause was called up to be set for trial defendants had ample time to assure themselves of the attendance of their witnesses but it was not until June 24th that any effort was made to ascertain Tietjen's whereabouts. Swayne & Hoyt, being engaged in the coastwise shipping, had the means of learning who constituted the crews on coastwise vessels. Defendants' attorneys were justified in relying on their clients to secure the attendance of necessary witnesses and defendants cannot be heard to complain of their own want of diligence. Had they made timely inquiry and learned that this witness could not be found or, if found, was so situated as to make it doubtful whether he

could attend the trial, the attorneys should have been so notified and given an opportunity to move for a postponement before the trial began. We cannot say that the court abused its discretion in denying the motion.

The judgment and orders are affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 22, 1914.

[Civ. No. 1217. Third Appellate District.—June 23, 1914.]

E. A. DORRIS, Respondent, v. ALTURAS SCHOOL DISTRICT OF MODOC COUNTY, Appellant.

MECHANICS' LIENS—NOTICE TO OWNER TO WITHHOLD PAYMENTS—ABANDONMENT OF WORK BY CONTRACTOR.—Where one who has furnished materials to the contractor for the construction of a school building serves notice on the school district, after the contractor has abandoned work on the uncompleted building and at a time when he has received all payments to which he is entitled, to withhold sufficient money to pay the claim of the materialman, the school district is not thereby in any way made liable to the materialman, under section 1184 of the Code of Civil Procedure.

ID.—EFFECT OF NOTICE AS GARNISHMENT—EXTENT OF OWNER'S LIABILITY.—Such notice has the effect of a garnishment of any money coming to the contractor which is in the hands of the owner, and the extent of the owner's liability to the materialman is measured by the owner's liability to the contractor.

APPEAL from a judgment of the Superior Court of Modoc County. Clarence A. Raker, Judge.

The facts are stated in the opinion of the court.

C. S. Baldwin, for Appellant.

Jamison & Wylie, for Respondent.

BURNETT, J.—The action was to recover the value of certain materials furnished by plaintiff to the contractor to be

used in the construction of a school building for the defendant district. There is no controversy as to the facts, and the decisive question is whether under the findings plaintiff is entitled to judgment. The contract for the building was executed on June 6, 1911, and it is set out in the answer herein. It provided that the contractor, Pearson, "shall and will for the consideration hereinafter mentioned, on or before the fifteenth day of November, 1911, well and sufficiently construct, erect and finish the stone and brick two story school building . . . conformable with and according to the plans, specifications and drawings signed by the said A. E. Pearson and filed . . . and approved by the board of trustees of said school district . . .; that he (Pearson) will, at his own expense and cost find and provide all such good, proper and sufficient materials of all kinds, whatsoever, as shall be necessary and sufficient for completing and finishing the said school building according to said plans, specifications and drawings and will provide and furnish all necessary labor thereon . . . for the sum of twenty thousand three hundred and fifty dollars, said sum to be paid to the said party of the second part in monthly installments as follows, to wit: Seventy-five per cent of the value of the material and the work upon said building to be paid to the said party of the second part on the first day of each month during the term of this contract, said value to be based upon the superintendent of construction's estimate. And the remainder of the said twenty thousand three hundred and fifty dollars after the full completion of said school building and upon its acceptance by the said board of trustees of the Alturas school district." The contract further provided: "Should the said contractor at any time during the progress of said work, refuse or neglect to supply a sufficiency of materials or workmen, the said first party shall have the right to provide materials and workmen to finish the said works, and the expense thereby incurred by said first party shall be deducted from the amount of said contract price."

The findings of the court inviting attention are as follows: "That pursuant to said contract said A. E. Pearson commenced the construction of said school building, and continued to supply work and materials for the same up to about January 1st, 1912, at which time he reached the end of his resources, ceased work upon the building and abandoned his

contract, and defendant thereupon took possession of said uncompleted building and supplied labor and materials necessary for its completion, according to the terms of the Pearson contract"; that said Pearson, while engaged in the work, received certain payments aggregating the sum of \$14,895. "The total value of all labor and materials furnished by said Pearson as estimated by the superintendent of construction, amounts to \$19,860.00. After the abandonment of the contract by said Pearson as aforesaid, defendant completed the building in accordance with the Pearson contract, and necessarily expended in so doing, the sum of \$5,848.38 for labor and materials. At the time of the abandonment of the contract by said Pearson, on or about Jan. 1st. 1912, there was in the building fund of defendant school district the sum of \$5,455.00, the unpaid portion of the contract price of said school building, all of which money defendant expended in completing said building, in the manner provided by the Pearson contract."

By other findings it appears that, during the months of September, October, November, and December, 1911, while Pearson was in charge of the work, respondent furnished certain quantities of brick to Pearson and to subcontractors under Pearson, all of which were used in the construction of said building. On the third day of January, 1912, and after the abandonment of the contract by Pearson, respondent served notice upon the trustees of the district that there was a balance of \$686.40 due him on account of brick furnished to Pearson and his subcontractors for use in said building and required them to pay said sum out of any money due or to become due said Pearson.

It is thus made entirely plain that the service of said notice constitutes the only possible ground for any liability on the part of said district. This notice was given in pursuance of section 1184 of the Code of Civil Procedure [Stats. 1911, p. 1315] and its legal effect is exposed in the following quotation from said section: "Upon such notice being given, it shall be lawful for the owner to withhold and in the case of property, which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for, the owner or person who contracted with the contractor shall withhold from his contractor sufficient money due or that may become due to such contractor, to answer to such claim."

But it is entirely clear that at the time said notice was served and at all times thereafter there was nothing due from said district to said Pearson. He was to be paid the balance when he completed the building, but he *never* completed it. After he abandoned the undertaking it was finished by the district at an expense greater than the amount that would have been due Pearson if he had fully carried out his contract. Under the express terms of the agreement, therefore—to say nothing of legal and equitable implications—there was nothing owing from the district to Pearson.

The said notice had the effect of a garnishment of any money coming to the contractor which was in the hands of the owner, the school district, and the extent of the latter's liability to plaintiff is measured by its liability to the contractor. That is to say, there was and is no liability at all.

Of course, if respondent had served his notice before the district paid Pearson all that he earned under the contract, a different situation would be presented. The governing principle of the case is covered by the decision in *Bates v. Santa Barbara Co.*, 90 Cal. 546, [27 Pac. 438]; *Denison v. Burrell*, 119 Cal. 180, [51 Pac. 1]; *Bianchi v. Hughes*, 124 Cal. 27, [56 Pac. 610]; *Butler v. Ng Chung*, 160 Cal. 438, [Ann. Cas. 1913A, 940, 117 Pac. 512]; *Suisun L. Co. v. Fairfield School Dist.*, 19 Cal. App. 595, [127 Pac. 349], and we can see no good reason for offering any additional suggestions upon the subject.

Apparently the only pretense of justification for holding the defendant liable is found in the language of section 1200 of the Code of Civil Procedure, as it formerly existed, as follows: "In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor shall be fixed as follows," etc. We need not enquire, however, whether this could be given effect to control the said contract of the parties, as this section was repealed May 1, 1911 (Stats 1911, p. 1319), and hence was not in force when plaintiff furnished said material.

It is to be deplored if plaintiff must lose his claim but we see no legal ground upon which he can enforce it against appellant. His contract was not with the latter, and he failed

to comply with the statutory condition necessary to create a liability against the district. He is presumed to have had notice of the contract between Pearson and the district and through his want of diligence he must suffer the consequences of his misplaced confidence in the contractor. It may be also that the building cost appellant less than it was really worth but, there being no claim of fraud, the district had the moral and legal right to stand upon the contract with Pearson, though respondent should go uncompensated for his materials that went into the construction of said building.

The judgment is reversed.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 246. Third Appellate District.—June 25, 1914.]

THE PEOPLE, Respondent, v. JOHN PEDDE et al.,
Appellants.

CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON BY PERSONS ESCAPING FROM OFFICER—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.—In this prosecution of two Indians for assaulting with a rifle, with intent to kill, a fish and game warden while they were making their escape from him after he had arrested them for fishing in violation of a county ordinance, the evidence is sufficient to support a verdict of guilty.

Id.—INTENTION OF ACCUSED—QUESTION FOR JURY.—It was for the jury to decide, in view of all the circumstances, whether the Indians intended to escape from lawful arrest, even though it might become necessary to kill one or both of the arresting officers.

Id.—CONSPIRACY TO COMMIT CRIME—PRESUMPTION THAT PARTIES UNDERSTAND CONSEQUENCES.—Where men confederate together to commit crimes of a nature or under such circumstances as will, when tested by human experience, probably result in taking human life, if such necessity should arise to thwart them in the execution of their unlawful plans, it must be presumed that they all understand the consequences which might be reasonably expected to flow from carrying into effect their unlawful combination, and to have assented to the taking of human life if necessary to accomplish the object of the conspiracy.

APPEAL from a judgment of the Superior Court of Lassen County. H. D. Burroughs, Judge.

The facts are stated in the opinion of the court.

Jamison & Wylie, R. M. Rankin, and T. H. Selvage, for Appellants.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

CHIPMAN, P. J.—It was charged in the information that Wilson Duke, John Pedde, and John Hendricks, at Lassen County, on the twenty-sixth day of April, 1913, with a deadly weapon, to wit, a rifle, made an assault upon the person of F. P. Cady and did then and there shoot and wound, with intent then and there to kill and murder him, the said Cady.

Duke had a separate trial, with what result does not appear. Pedde and Hendricks were jointly tried and the jury rendered a verdict of guilty as charged recommending them to the mercy of the court. Judgment of conviction followed and they were each sentenced to imprisonment for the term of three years at San Quentin. The appeal is from the judgment.

The only claim made for reversal is that the evidence is insufficient to justify the verdict and that no greater offense was shown than simple assault.

The defense of the Indians seems to have been in charge of Mr. T. H. Selvage, deputy U. S. attorney, and the prosecution was conducted by the district attorney of the county.

F. P. Cady and Joseph R. Nelligan were, on April 26, 1913, fish and game wardens. On that day they arrested a party of eleven Indians, old and young, whom they found, about the hour of noon, fishing and having fish in their possession, in violation of a county ordinance, at Cedar Creek, about eight miles from the town of Madeline. After being placed under arrest Nelligan searched each one of the party for arms and fish and found no weapons but all had fish. They left the fishing ground, Cady and Nelligan on foot and the Indians on horseback, Cady in front and Nelligan at the rear of the party. They had gone about one mile to a point, near some buildings, without anything noticeable occurring. What then took place was testified to by Cady and Nelligan. Cady testified that at this point defendant Hendricks was riding beside him, defendant Pedde immediately behind Hendricks,

and Duke directly behind witness, Cady. What occurred will be given in the witness's language: "When you arrived at these buildings what happened there? A. Someone behind and to my right said 'How far are we going?' I looked over my shoulder and said 'To Madeline.' The defendant John Pedde replied, 'Can't go to Madeline, too far.' I then stopped and turned partially around and said 'You have to go to Madeline, that is the nearest place, no other place to take you.' He replied 'Can't go to Madeline, got to talk that over,' and commenced to get off his horse. Q. What did you do then? A. I immediately turned to my left and found Wilson Duke off his horse and so close to me, just putting his hands on me. So close to me that I couldn't get the muzzle of my rifle down to shoot. I then, when I found I could not shoot, raised the rifle to strike him and he caught the barrel of the rifle. Q. Where was John Hendricks and John Pedde at that time? A. Almost at the same instant or so close to it that I could not tell any difference in the time the defendant John Pedde jumped on my back and caught me around the shoulders and Hendricks caught me by this arm. Q. Go on and relate what happened. A. The rifle was taken away from me. Wilson Duke had it and then stepped back sideways from me with the gun in this position, looking back toward the rear where Nelligan was. Q. Toward the rear of the column? A. Yes, sir. Q. What was John Pedde and Hendricks doing then? A. They held on to me and sometimes I was down on my knees and sometimes up until I finally got loose from them. All the time I was trying to get my pistol out that I had in a scabbard. When I got loose they immediately ran. I looked for Wilson Duke and he stood behind a little pile of lumber about perhaps fifteen steps from me. I can't estimate the distance correctly. He was in an upright position with the gun in this position looking back somewhere toward the rear of the column. I looked to see where Nelligan was. Mr. Selva: We object to this on the ground it is immaterial and irrelevant. There is no charge here in this case against Wilson Duke. Duke is not on trial and the testimony as to what Duke did from this point on is immaterial. The Court: Overruled. A. And saw Nelligan lying on the ground face downward apparently dead. I then shot at Wilson Duke twice without any apparent effect and didn't even make him look around

and notice me. The third time I took a deliberate aim and saw the bullet hit the ground between he and I close to his feet. He immediately turned and raised the gun to shoot and I started and ran for a little building directly below the road and a little distance off to get behind that. As I ran I heard the report of a rifle once when I was part way to the house. Just as I got to the corner of the house and started to turn I heard the report again and the bullet struck me. Q. Where did it strike you? A. In back here and came out here in the side. Q. How were you armed, Mr. Cady? A. With a thirty-thirty Winchester rifle and thirty-two caliber automatic Colt's revolver." . . .

A map was used and different positions of the parties noted on it but no map was sent up with the record. . . . "Q. Now, Mr. Cady, you say that Wilson Duke succeeded in getting this rifle away from you? A. The three of them did. Q. What was John Pedde and John Hendricks doing? Relate what they were doing at that time. A. John Pedde had me around the shoulders partially on my back and round the shoulders and John Hendricks had me pulling on this arm and Hendricks pulling me back from the shoulder, or Pedde on the shoulder. Q. Did you succeed in getting away from them? A. Yes, after a little time. Q. What became of them after you got loose, do you know? A. I don't know. Q. Can you indicate on the map the object there that would represent the little house behind which you ran? A. This one down here. Q. Are you able to approximate the distance of that house from the place where this occurrence took place? A. Approximately—you say where the occurrence took place; you mean from this point? Q. Yes, sir. A. Approximately between forty-five and fifty yards. . . . Q. At the time of this skirmish there what became of the other Indians? A. I don't know. Q. When this shooting or when this shot struck you in the back as you state, did you fall? A. I made one or two short steps and then—I shouldn't say fell. I lay down behind the house. Q. Did you see any of the Indians after that? A. I saw one. Q. Do you know which one it was? A. I could not say positively. To the best of my knowledge it was Hendricks. Q. Where was he? A. Riding a white horse going along the hillside along here and leading a dark colored, bay or brown, horse with an empty saddle." The testimony

of the Indians was that they all took to flight as soon as the shooting commenced.

On cross-examination Cady was asked what Duke did when he got the gun and replied: "Stepped right out still facing me this way. He stepped off sideways with the gun this way looking back in this direction. Q. How did you come to notice he was facing in that particular position when two men had you down or forcing you down? A. It was all in an instant's time and when he got the gun I naturally kept my eye on the gun expecting to see him use it on me. Instead of that he kept looking back the other way and took no further notice of me that I saw. Q. How far did he go? A. I couldn't tell how far it was. Q. There is a lumber pile marked here. A. That represents a lumber pile. Q. We will mark that X5. How far from that point was it to where Wilson Duke went after he got the gun from you? A. How far from which point? Q. From X5." The question was not answered, but later along he estimated it . . . "Q. How long was it after John Pedde and John Hendricks grappled with you that they left you? A. I couldn't tell you. Q. Do you know where they went? A. No sir. Q. Why didn't you watch them? A. I was too busy. Q. They were the ones you were busy with? A. Not after they left me. Q. Why did they leave you? A. I got loose and got the pistol and saw them go. I didn't know where they went, I didn't watch them. Q. Had you forced them loose from you? A. I couldn't tell you. Q. Do you know whether they left you alone and run away? A. I could not say. Q. Did you pay any further attention to them? A. No sir. Q. Why didn't you? A. I was looking for the man with the gun. Q. You knew they were harmless was the reason you didn't pay any further attention to them? A. No sir. The reason was I wanted to see where the man with the gun was. Q. The man with the gun wasn't looking at you? A. Not when I looked at him he wasn't. Q. You pulled a pistol and fired at him? A. Yes sir. Q. He was still looking the other way? A. Yes sir. Q. And you fired again? A. Yes sir. Q. And he was still looking the other way? A. Yes sir. Q. And you fired a third shot? A. Yes sir. Q. And struck the dirt at his feet and threw up dirt at his feet? A. Somewheres in the neighborhood of his feet. Q. And threw up dirt all around him? A. No sir, it didn't throw up dirt all around him. There is

sand there and it threw up a little cloud of sand at his feet. Q. How close did it strike to his feet? A. I couldn't estimate. Q. And that attracted his attention? A. I presume so, something did . . . Q. Did you hear any shots during that time? A. None but my own. Q. When you saw the dirt fly up and his attention was called to your shot what did he do? A. I didn't say his attention was attracted by my shot but what he did was to turn toward me and start to raise the rifle. Q. Show me where you were standing at the time as near as you can. I want you to tell us as near as you can. A. As near as I could judge when I think it over, about fifteen steps from there in this general direction. That is practically somewhere near the line between this cabin and the lumber pile below the road. Q. Mark the place as near as you can where you think you were. A. Somewheres in this neighborhood. I don't know. Q. We will call it X7. The point where you were at the time you did the shooting was at X7. During all this time you were shooting there at Wilson Duke you stood about at the point that you mentioned, about that point? A. Somewheres in that neighborhood. Q. During that time you didn't move? A. I have no recollection of moving during the time I was shooting. Q. Did you shoot as rapidly as you could or take pretty careful aim? A. The first two shots I shot pretty quick. When I saw I had not hit him I stopped and took deliberate aim. I saw he was not looking at me and that was the one that struck the ground. Q. How far did you say you were from him at the time? A. It is a matter of guess only. A man don't estimate distances on occasions of that kind, but somewheres from fifteen to twenty steps . . . Q. When he turned toward you and brought his gun up on a level did you think he was going to shoot you then? A. Yes sir. Q. And you ran? A. I did, yes. Q. When you were shooting at him and saw that he paid no attention to your shots why didn't you run closer to him and make certain? A. I thought I was close enough. I thought I was a good enough shot to hit him if the pistol would shoot all right."

He testified that he heard two rifle shots before he got behind the cabin. The last shot struck him. "I presume I fainted as I didn't see anything for sometime . . . Q. You didn't hear any shots except—up to the time you quit shooting you didn't hear any shots except your own? A. No sir.

Q. And from that on you heard no shots except two rifle shots behind you? A. That is all. I swooned immediately. Q. In other words if there was a battle going on between Wilson Duke and Nelligan you didn't hear a shot fired? A. If I did it didn't make any impression on my mind so I could testify to it. Q. At no time did you hear any shots until you commenced firing yourself? A. No sir, I have no recollection of hearing a shot. Q. Up to that time you yourself had not been shot? A. No sir. Q. You don't know whether or not Nelligan was shot when he was laying there? A. No sir. I didn't at that time. I know now. Q. You only know by hearsay now? A. I saw his condition. Q. But you don't know when he was shot? A. No, I don't know the time he was shot. Q. When you got through shooting did you see any Indians about there. A. Only Wilson Duke."

Nelligan testified that when the party stopped near the building and lumber pile mentioned above he was back seventy or eighty feet and heard some conversation in front but distinguished only the word Madeline. "They were talking among themselves but I didn't understand them. Q. What did you see? A. I saw Wilson Duke rush off his horse and rush in on Mr. Cady and then Pedde and Hendricks, one had him by the arm and I saw the other on his back struggling with Frank the last I saw. Q. What did you do? A. I started to rush up there and just took a few steps and this Wilson Duke had the gun already and stepped out to the side and I run in back of Smokey Charlie's horse and just as I stepped around behind the horse he shot me in the leg. Q. Wilson Duke shot you? A. Yes sir. Q. What did he shoot you with? A. A thirty-thirty, Frank's gun. Q. What did you do? A. It turned me and when I came around I shot at him. Q. Did you fall? A. Yes sir. Q. What was done then? A. The shooting went on. He run for the lumber pile. Q. He, who do you mean by he? A. Wilson Duke. He went in back of that lumber pile and shot me again in the breast. Q. The first time he shot you in the—A. Leg. . . . Q. What else happened? A. I kind of dazed off after that and don't know exactly how long it was but in a few seconds I was in a daze and when I come to he was standing watching me with the rifle up to his shoulder watching me and I slipped my hand in my pocket and took out a shell and inserted it in the automatic and fired and shot him. He

dropped the rifle. Threw up his hands and dropped the rifle. Q. Before this did you see Frank Cady? A. I did. Q. Where? A. Ahead of me. Q. What was he doing? A. Scuffling with John Pedde and John Hendricks. Q. After this scuffle did you see him after that? A. Yes sir. Q. Where? A. He started to run toward a building in that direction. Q. Tell what you saw. A. I saw Wilson Duke shoot at him twice. Q. When he was running toward the building? A. Yes sir. Q. Wilson Duke was standing at the lumber pile? A. Yes sir. Q. What happened after that? A. I come to and crawled up and got the rifle and started to crawl toward the lake. Q. You say he shot you once in the leg and then shot your little finger off? A. The second shot hit me in the breast. Q. Explain where that shot hit. A. It hit here and come out down in here over my heart. That is where the hole was. They was showing me my heart thumping. Q. In what position were you when this second shot hit you? A. Laying down. Q. Laying on the ground? A. Yes sir. Q. Watching Wilson Duke? A. Yes sir. Q. And he was standing near the lumber pile? A. Yes sir."

Several of the Indians were witnesses at the trial and all testified that Pedde and Hendricks were not riding next to Cady, but were back in the group and that Cady struck Duke with his gun and pulled Duke off his horse. They also testified that the first shot was fired by Nelligan. They all agree that all the Indians, other than Duke, fled as soon as the shooting commenced. The testimony was that Pedde reported the affray to some white men who went to the place and carried Cady and Nelligan away. It also appeared that some of the Indians returned and carried Duke to his home. Witnesses testified and it was admitted by the prosecution that the defendants bore a good reputation for peace and quiet and it appeared that they were engaged in farming and lived a quiet and peaceable life. The jury, however, were authorized to accept the testimony of the two prosecuting witnesses and from their description of the encounter arrive at a conclusion.

The question is: Does the evidence warrant the inference that Pedde and Hendricks made the assault on Cady with intent to murder him? So far as the assault on Nelligan is concerned it is no part of the crime charged and the facts relating to it are material only as they shed light upon the charge that Cady was assaulted with murderous intent.

Cady's testimony was that when he saw Nelligan down Duke was paying no attention to Cady and did not do so until Cady had fired three times at him. Duke then turned upon Cady who ran for cover and Duke shot him in the back. It is not clear from Nelligan's testimony whether all the shots fired at him, Cady, by Duke were from the lumber pile. He thought the first shot that wounded him in the leg was when Duke was about half way from Cady to the lumber pile.

There was no evidence of any concerted action on the part of these three Indians until they were told that they were being taken to Madeline. They replied, "too far, got to talk it over, can't go to Madeline," and, without further parley, according to Cady's testimony, the three immediately dismounted and pounced upon him and Duke got the rifle. Cady testified that they did not try to get his revolver and he did not know whether they knew he had one. Pedde and Hendricks were undoubtedly guilty of an assault and they were guilty of resisting a lawful arrest by an officer in the discharge of his duty and of making their escape from lawful arrest. The tragedy was of short duration and the events followed each other quickly. It was but a few seconds after Duke got the rifle that he commenced firing on Nelligan and the fusillade between the parties was rapid until all three were down. And the testimony of Nelligan was that Duke fired the first shot, from which the jury might well have inferred that he at least intended to use the weapon when he took it from Cady. That the gun was taken pursuant to the concerted purpose of all three Indians, as an aid to their escape from arrest, though that purpose was instantly formed after they were told they must go to Madeline, we think fairly inferable from the evidence. At one point in his testimony Nelligan testified as follows: "Q. Where did you last see Pedde and Hendricks? A. Struggling with Frank Cady. Q. After Wilson Duke had the gun or before? A. After and before both. Q. And you never saw them after that? A. After they were struggling with Frank? Q. Yes. A. Yes, when I was laying on the sand here alongside of the road they were struggling with Frank. Q. After that did you see them? A. No, I didn't." If this be true, defendants must have been struggling with Cady while Duke was shooting at Nelligan. It was for the jury to reconcile this statement with Cady's, who testified that Pedde and Hendricks ran

away or that he did not know where they were after Duke got his rifle. We cannot say that Nelligan was mistaken in this and if true, it connects Pedde and Hendricks so intimately with the consequences which followed as to make them responsible and equally guilty as aiding and abetting Duke in his part of the conspiracy. "All persons concerned in the commission of a crime, whether it be felony or misdemeanor or whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." (Pen. Code, sec. 31.)

It was said, in *People v. Brown*, 59 Cal. 345, 352: "Where men confederate together to commit crimes of a nature or under such circumstances as will, when tested by human experience, probably result in taking human life, if such necessity should arise to thwart them in the execution of their unlawful plans, it must be presumed that they all understand the consequences which might be reasonably expected to flow from carrying into effect their unlawful combination, and to have assented to the taking of human life if necessary to accomplish the object of the conspiracy."

The circumstances in the case at bar are not so incriminatory as they were in the case cited, yet defendants were engaged in acts punishable as a crime. (Pen. Code, secs. 69, 148.) We feel compelled to hold that the facts were sufficient to justify the verdict. The argument of counsel is based on the statement of Cady that defendants ran away as soon as Duke got the gun and had no part in the shooting. But, as we have seen, there was evidence that they held Cady while Duke was shooting at Nelligan. Nelligan was in position to observe the movements and acts of these men and better able to judge of what was taking place prior to his being himself shot than was Cady who was engaged in the personal encounter and being roughly handled by the Indians. It was for the jury to decide, in view of all the circumstances, whether the Indians intended to escape from lawful arrest even though it might become necessary to kill one or both of the officers.

It is suggested that the feelings of the community at the place of the trial were highly inflamed toward the defendants and that this public sentiment found its way to and influenced

the jury to defendants' prejudice. There is no evidence in the record pointing in the slightest in that direction.

The judgment is affirmed.

Burnett, J., and Hart, J., concurred.

[Civ. No. 1192. Third Appellate District.—June 25, 1914.]

THE PEOPLE, Appellant, v. CHARLES T. LAUGENOUR,
Respondent.

DEDICATION OF LAND FOR HIGHWAY—WHAT CONSTITUTES—PLATTING OF LAND AND RECORDING OF MAP.—The survey, platting, marking, and mapping of lands, delineating a strip through them for purposes of a highway, and the filing of the map with the county recorder, constitutes an offer of dedication of the roadway delineated on the map as a public highway.

ID.—DEDICATION BY VENDOR—RATIFICATION BY VENDOR.—The fact that the platting and the recording of the map were done by the person who held a contract for the purchase of the lands, instead of by the owners thereof, is not material, if the owners thereafter make conveyances by reference to the map and the highway outlined thereon.

ID.—OFFER AND ACCEPTANCE OF DEDICATION—MANNER OF MANIFESTATION.—The offer of the owner of land to dedicate a highway, and the acceptance of the offer by the public, may be manifested in many different ways.

ID.—CONSUMMATION OF DEDICATION—WHEN ACCOMPLISHED.—If a binding offer to dedicate land for a highway has been made by the owners, and before revocation thereof an acceptance by the public is manifested, either by a formal act of the authorities, or by habitual user by the public a sufficient length of time clearly to show that the way has been thus recognized, used, and accepted as a public highway, the dedication is fully consummated.

ID.—CONSTRUCTIVE DEDICATION—SALE OF LOTS WITH REFERENCE TO MAP.—Where the owner of land has platted it, laid out streets or roadways, and has sold the land by reference to such plat, or where he has a map or plat made, and, selling the smaller subdivisions, has described them as bounded by a road laid out through the larger tract, a constructive dedication arises.

ID.—COMMON-LAW DEDICATION—ESTOPPEL AGAINST OWNER.—Independently of statute, the use of a street by the public for a reasonable length of time, where the intention of the owner to dedicate is

clearly shown, is sufficient, without any specific action by the municipal authorities, either by resolution or by repairs or improvements. A common-law dedication operates against the dedicator by estoppel, and this estoppel may be invoked by or on behalf of the public at large as well as by the municipal authorities of the city.

ID.—IMPLIED OR CONSTRUCTIVE DEDICATION—FACTS AND CIRCUMSTANCES SHOWING.—Where the owners of a tract of land caused it to be surveyed and subdivided into smaller tracts with a roadway running through the larger tract upon which the smaller subdivisions abut, recorded the map, made sales of many of such smaller tracts according to the plat, and the purchasers thereafter, for at least twenty years, continuously use the roadway without objection, a dedication is thereby established, notwithstanding no express acceptance was attempted by the county authorities until about eighteen years after the recordation of the map, and the county never worked the road or otherwise recognized it as a public highway, and at the time of the filing of the map both ends of the roadway were inclosed, and a portion of the roadway was cultivated and used for pasturage by purchasers of the tracts.

ID.—WIDTH OF HIGHWAY—WHETHER TRAVELED WAY IS CONCLUSIVE THEREOF.—Where there is a finding or indisputable evidence that a roadway dedicated to the use of the public is, as so dedicated, of a certain width, the fact that the main travel has customarily been confined to narrower limits than the width of the road as marked out and dedicated is not conclusive of the width of the road.

APPEAL from a judgment of the Superior Court of Yolo County. N. A. Hawkins, Judge.

The facts are stated in the opinion of the court.

A. G. Bailey, for Appellant.

Arthur C. Huston, for Respondent.

HART, J.—This is an action instituted in the name and on behalf of the people of the state of California by the district attorney of Yolo County against the defendant for the purpose of securing a decree: That a certain strip of land situated in said county and specifically described in the complaint be declared a public highway; that certain obstructions alleged to have been placed and to be maintained on said land be abated or removed, "and that the defendant be enjoined from further maintaining said obstructions, or any of them upon, over, across or along said highway, and for costs of suits."

The strip of land in dispute is described as being a roadway sixty feet wide, running west from the Knight's Landing and Woodland Road, across Coward's subdivision of the Marston Tract, and bounded on the north by lots 12, 13, 14, 15, 16, and 17 and on the south by lots 5, 6, 7, 8, 9, 10, and 11 of said Coward's subdivision of the Marston Tract, according to the map or plat thereof on file and of record in the office of the county recorder of said county of Yolo. It is alleged in the complaint that said strip of land "is now, and for more than 24 years last past has been, a public highway, dedicated and abandoned to the public, and accepted and used by the public during all of said time as a public highway"; that the same "is a public highway, duly and legally accepted as a public highway by the board of supervisors of the county of Yolo," etc. The complaint then charges that the defendant, on or about the sixteenth day of May, 1912, and prior to the filing of the complaint herein, "plowed up said highway, and erected, constructed, built and maintained a levee and other embankments, excavations, cuts and ditches over and across said highway, and that said defendant tore up the roadway and the roadbed of the said highway and left said roadbed in great lumps and clods"; that said highway is still being maintained by the defendant in the condition as thus described and that thereby the right of the public to travel over and along said highway in the usual and customary manner is interfered with.

The answer denies that the land described in the complaint was ever a public highway, dedicated or abandoned to the public, or accepted or used by the public at any time for that purpose; denies that said land was ever dedicated for the purpose of a public highway or duly or legally accepted for such purposes by the board of supervisors of the county of Yolo; admits that the defendant did, at about the time mentioned in the complaint, make certain excavations in and erect certain embankments on said land and that he is still maintaining thereon said embankments, etc., but avers that the defendant had a legal right to do said work "and to do or perform any act done or performed by him on said lands and premises, and referred to in said complaint." Further answering said complaint, the defendant "alleges that the said lands and premises do not constitute a public highway, and the said plaintiff herein has no interest whatever in said right-

of-way, and the public has no interest therein, and the same does not constitute a highway."

The findings of the court coincide with the denials and admissions of the answer, and the defendant was, accordingly, awarded judgment, from which this appeal, supported by a transcript of the testimony, is prosecuted by the plaintiff, said appeal having been taken under the new or alternative method prescribed by sections 953a, 953b, and 953c of the Code of Civil Procedure.

The undisputed facts are: That, on the twelfth day of November, 1886, W. W. Brownell and J. D. Laugenour, having previously purchased from one H. F. Marston a certain tract of land, situate in Yolo County, entered into the following agreement respecting said land with one W. M. Coward: "The parties of the first part (Brownell and Laugenour) bind themselves to deed said land above referred to, in tracts or parcels as the same shall be sold by the party of the second part (Coward), and to make good and sufficient deeds to the purchasers, provided that no expense for conveyancing shall accrue to the parties of the first part. The party of the second part agrees not to sell any of said land at less than one hundred dollars per acre, without the consent of said parties of the first part, and to apply the entire proceeds of each sale at the time such sales may be made to the payment of a certain promissory note of even date herewith given by said second party to parties of the first part for the sum of thirteen thousand dollars, with ten per cent interest, and due on or before two years from date. As soon as complete payment shall have been made of the principal and interest of said described note, the parties of the first part agree to convey all of said land that may remain unsold to the said party of the second part, or to his heirs or assigns, free from all encumbrances. This agreement is for the security of the said sum of money and it is intended as a bond for a deed to the party of the second part, but the obligations of the parties of the first part under this agreement to the party of the second part shall cease at the expiration of two years from the date hereof or at the date of the expiration of the above described note . . .

"And it is further agreed by and between the said parties that all rents, issues and profits arising from the said above described premises shall accrue to the said W. M. Coward, the

party of the second part, for the term of two years from the date of this agreement."

The foregoing agreement, duly signed and acknowledged by the parties thereto, was recorded in the office of the county recorder of Yolo County, on the fifteenth day of December, 1886.

Subsequently to the filing for record of the said agreement, Coward caused the tract of land described therein to be surveyed, and subdivided the same into smaller tracts. This survey called for and located a roadway across said entire tract, sixty feet in width, and running east and west, and connecting on the east with the county road running in a northerly and southerly direction from the town of Knight's Landing to the city of Woodland. A map or plat of said subdivision, including the roadway in question, as so surveyed and laid out, was, at the instigation and under the supervision of said Coward, made and completed by the surveyor on the twenty-eighth day of January, 1887, and said Coward caused the same to be filed for recordation with the county recorder of Yolo County on the tenth day of June, 1887, and it was on that day duly recorded by that officer. The roadway so laid out and delineated on said map was fenced off. The smaller tracts or subdivisions were then placed upon the market for sale and all that were sold, of which there were many, were conveyed by reference and according to the said map or plat.

Among the lots of said subdivision conveyed by J. D. Laugenour and W. W. Brownell, under their agreement with said Coward, was one to F. M. Price. The deed to Price reserved "to the grantors one acre in the S. W. corner of the tract described, to be laid out as nearly square as may be, and a right of way over the tract sold to the tract reserved."

On June 11, 1887, said Laugenour and Brownell, in pursuance of their contract with Coward, conveyed to Messrs. Allison & Treat portions of the Coward subdivision and which embraced 172.69 acres. The deed to Allison & Treat contained, as in effect do all the deeds conveying portions of said subdivision, the following provisions: ". . . , also a roadway over the route heretofore reserved in the deed to F. M. Price, and the right to use the acre reserved in said deed in common with all purchasers of portions of said Marston tract and right of way for irrigating ditches as designated on the plat of said subdivision."

On August 9, 1889, Allison & Treat conveyed the land described in said deed to one George Poinsett, the said deed containing the same language concerning a roadway, etc., as that above quoted, and, on May 31, 1893, Poinsett conveyed the same land or tract to the defendant in this action, C. T. Laugenour, the deed to the latter following the language relative to the roadway, etc., contained in the two previous deeds referred to.

On the seventh day of March, 1905, the board of supervisors of Yolo County adopted a resolution purporting to be and intended as a formal acceptance of the avenue or roadway in controversy as a public highway. It will thus be noted that there elapsed between the date of the recordation of the map of the subdivision and the date of the purported acceptance by the board of supervisors of the roadway as a public highway a period of almost eighteen years.

The undisputed evidence shows that the avenue in question was, at all times and continuously after the sale of lots in the subdivision through which it passes, used by the purchasers of said lots and their successors in interest and such other persons as had business or other relations with those residing in said subdivision. The evidence further shows that the county never did any work on said roadway or otherwise recognized it as a public highway until about and after the time of the adoption by its board of supervisors of the resolution purporting to accept said roadway as a public highway, and above referred to.

It appears that, some time prior to the year of 1893, a fence had been erected along the entire north boundary line of the roadway. It also appears to be an undisputed fact that the defendant or his predecessors in interest planted a row of olive trees in the road some six or eight feet south of the fence just mentioned. Others owning lots abutting upon the roadway also cultivated portions of the same in one form or another. There remained at all times, however, an open and unobstructed track in the roadway of about twenty or twenty-five feet in width, and it was this track or way over which the people traveled back and forth through the Marston or Coward subdivision. The people owning property in said subdivision occasionally, or whenever it was necessary to facilitate the convenient use of the road, worked on and improved

the roadway. It was shown that some of the owners of property in the Diggs subdivision had on various occasions worked on and graded the road.

The evidence shows that for quite a period of time a fence was maintained across the west end of the avenue or roadway, or at a point where what was known as the "Diggs subdivision" adjoins the Coward subdivision. This fence had been removed prior to the time at which the defendant became the owner of his tract of land in the latter subdivision. At the east end of the roadway, where it intersects with the county road running between Woodland and Knight's Landing, a gate or a "panel" had always been maintained. This gate was generally kept open until the defendant came to the subdivision, after which he aimed and endeavored to keep it closed. A controversy arose between the owners of property in the subdivision and the defendant over the matter of the closing of the gate, the defendant insisting that the gate should be kept closed and the other owners of land in the subdivision claiming that to keep the gate closed would be in violation of their rights. This controversy led to the proceedings by the board of supervisors whereby the county attempted formally to indicate its acceptance of the roadway as a public highway.

It is admitted that the road was constantly used for a period of about twenty years before the institution of this action, not only by the residents of the Marston or Coward subdivision but also by those residing on the Diggs subdivision, which, as seen, joins the former subdivision on the west. The defendant himself testified that the road was and had been for many years used by the residents of the Coward subdivision and by other people having business with or occasion to visit the residents of said subdivision.

The foregoing embraces a statement in substance of all the important evidence produced at the trial, and, as before stated, it is admitted that the facts thereby established are true.

The defendant contends that, while he has never denied, nor does he now deny, that the road in question constitutes a private way for the use of the owners of the lands situated in the Coward subdivision, said roadway is not a public highway. Indeed, in his testimony, the defendant goes so far as to de-

clare that ownership of the land constituting the roadway was in him, but that he did not "deny the people the privilege of passing over it."

In support of his position, the defendant emphasizes the following propositions of fact developed by the evidence: That the county never worked the road and never made any attempt to accept it as a highway until about eighteen years after the map of the Coward subdivision was recorded; that, at the time of the filing of said map, both ends of the roadway were inclosed, either with a fence or a panel; that at all times the east end was closed with either a panel or a gate; that, since said "strip of land does not touch a county road on the west, the same was not thrown open to the public" at any time from the date of the filing of the map to the present time; that the avenue has been used for pasture purposes, and that "it has never been traveled except by persons residing on the subdivision and those who had business with them."

It cannot be doubted that the survey, platting, marking, and mapping of the lands concerned here and the filing of said map with the county recorder constituted an offer of dedication of the roadway delineated on said map as a public highway. (*People v. Reed*, 81 Cal. 70, [15 Am. St. Rep. 22, 22 Pac. 474]; *Forsyth v. Dunnigan*, 94 Cal. 438, 441, [29 Pac. 770]; *Prescott v. Edwards*, 117 Cal. 298, [59 Am. St. Rep. 186, 49 Pac. 178]; *City of Los Angeles v. Kysor*, 125 Cal. 463, [58 Pac. 90]; *Davidow v. Griswold*, 23 Cal. App. 188, [137 Pac. 619].)

The point first urged by the defendant that the acts of Coward in platting, mapping, and recording the map cannot be held to be an offer of dedication for the reason that he was not the owner of the land and, therefore, had no right or authority to make the offer, is without force, inasmuch as it is undisputed that the tract was subdivided and the road in question laid out by Coward under his agreement with Laugenour and Brownell and by the authority of the latter, and since, furthermore, Laugenour and Brownell acquiesced in and ratified the act of platting the tract as delineated on the map by making their deeds of conveyance by reference to said map and the road in question as outlined thereon.

The single question remaining is: Does the evidence disclose that there was an acceptance of said offer of dedication of said road by the public?

It is very doubtful whether the purported formal acceptance of the offer of dedication of said road as a public highway by the board of supervisors under the circumstances as above indicated may be held to be a legal acceptance. This question need not, however, be decided here. "The offer of the owner to dedicate may be manifested in a hundred different ways, *and the acceptance of the offer by the public may be manifested in a like number of ways.*" (*City of Los Angeles v. Kysor*, 125 Cal. 463, [58 Pac. 90].) If a binding offer to dedicate has been made by the owner and before revocation of such offer by any act or acts of the donor an acceptance of the offer by the public is manifested either by a formal act of the public authorities or by habitual user by the public a sufficient length of time clearly to show that it was thus recognized, used, and accepted by the public as a public highway, then the dedication is fully consummated. And it has been held that where the owner of land has platted the same and laid out streets or roadways and has sold the land by reference to said plat, or where he has a map or plat made and, in selling the smaller subdivisions, has described them as bounded by a road laid out through the larger tract, a constructive dedication arises. It is true that some of the cases hold that the acts last referred to do not in strictness constitute a dedication, but that their effect is to work an estoppel, *in pais*, precluding the donor or owner of the lands through which the way passes, and all claiming under him, from asserting any ownership inconsistent with the use of the way as such. (*Elliott on Roads and Streets*, 3rd ed., p. 147; *Brown v. Manning*, 6 Ohio, 298, [27 Am. Dec. 255]; *M. E. Church v. Mayor etc. of Hoboken*, 33 N. J. L. 13, [97 Am. Dec. 697]; *Oregon City v. Oregon Street Railroad*, 44 Or. 446, [74 Pac. 926]; *Davidow v. Griswold*, 23 Cal. App. 188, [137 Pac. 619].) But whether the acts mentioned amount strictly to a dedication or merely work an estoppel *in pais*, precluding the owner from claiming rights in or over the street or roadway inconsistent with their use by the public as a public way is immaterial, for, as is said in *Davidow v. Griswold*, the result is the same.

In *Smith v. San Luis Obispo*, 95 Cal. 463, [30 Pac. 591], it is said: "Independently of the statute, however, we think the use of the street by the public for a reasonable length of time, where the intention of the owner to dedicate is clearly

shown, is sufficient, without any specific action by the municipal authorities, either by resolution or by repairs or improvements. A common-law dedication operates against the dedicator by estoppel, and this estoppel may be invoked by or on behalf of the public at large as well as by the municipal authorities of the city; for a street is a highway for the use and benefit of the public at large, though under the immediate care of the municipality."

In *Archer v. Salinas City*, 93 Cal. 43, [16 L. R. A. 145, 28 Pac. 839], it is said: "Dedication is an ultimate fact, dependent upon the establishment of other facts, and is to be found from the evidence presented to the court. (*Harding v. Jasper*, 14 Cal. 648.) It results from the acts of the owner of the land, coupled with the intent with which he does those acts. It may be express, and completed by a single act, as when the land is dedicated by deed, or it may be implied from a series of acts, as when the owner subdivides a tract of land into blocks and streets, and causes a map of such subdivision to be recorded, and sells the several subdivisions which front upon those streets. Whenever the dedication is complete, the property thereby becomes public property, and the owner loses all control over it or right to its use. Even though the acceptance presumed from an express dedication may not impose upon the public all the obligations that an express acceptance would impose, yet the owner is as much concluded by his dedication in the one case as in the other. If the dedication is complete by his act, whether express or implied, it is thereafter irrevocable by him, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on his part. The property dedicated has become public property, impressed with the use for which it was dedicated, and neither can the public divert it from that use, nor can it be lost by adverse possession. Nor is the effect of such dedication impaired by any delay in the use of the land for which it was set apart. Such failure to make use of the land does not authorize the owner to resume possession. The public can thereafter appropriate the land to the use for which it was dedicated whenever convenience or necessity may suggest."

After quoting the foregoing excerpt from the *Archer* case, this court, in *Davidow v. Griswold*, 23 Cal. App. 188, [137 Pac. 619], adds: "A very large number of cases from other

jurisdictions holding similarly is cited by respondents but we may forego specific consideration of them. In some, it is assigned as a sufficient reason for saying that the dedication is complete that the purchasers represent the public, that the latter is not a distinct class from the former, that the purchasers are as much a part of the public as those who use the streets for the purpose of travel and that they have equal authority to accept a dedication of the streets for the public."

We can see no escape from the conclusion that the facts of the present case bring it clearly within the rule enunciated in the foregoing cases.

It is true that the question of dedication "is an ultimate fact, dependent upon the establishment of other facts, and is to be found from the evidence presented to the court." (*Harding v. Jasper*, 14 Cal. 648; *Archer v. Salinas City*, 93 Cal. 43, [16 L. R. A. 145, 28 Pac. 839].) In this case, however, as we have shown, the facts are undisputed. The filing of the map with the county recorder constituted a clear and unquestionable manifestation by the owners of the subdivision of an intention to dedicate the roadway in question to the use and benefit of the public. The evidence undoubtedly shows, and, indeed, it is admitted, that the public continuously used the road from the time that it was laid out and the map was filed. To recapitulate briefly the evidence, we find this situation presented in this case: That the owners of a tract of land had the same surveyed and subdivided into smaller tracts, with a roadway running through the larger tract and upon which the smaller subdivisions abutted; that, as so subdivided and marked out, the land was platted and mapped and the owners caused the map to be filed as a public record; that they sold many of the smaller subdivisions according to the plat as indicated by said map, the road in question being delineated thereon; that for at least twenty years said roadway has been customarily and continuously used by the purchasers of the smaller tracts and by any part of the public having occasion to use or travel over the same, no objection, until the defendant objected, ever having been made against the use of the road by the public.

The fence across the west end of the Coward subdivision was there when the tract was subdivided, platted, and mapped, as was likewise the gate at the east end. These circumstances

cannot, therefore, be regarded as evidence of an intention in the owners of the tract to revoke the offer of dedication.

Nor, under the circumstances of this case, can the fact that certain parts of the roadway as delineated and described on the map filed with the public recorder were cultivated and planted to trees and cereals or vegetables or used as pasture be accorded any significance as proof of the revocation of the dedication. The roadway as laid out was sixty feet in width and it was so outlined on the map. The uncontradicted evidence shows that it was the purchasers of lots in the subdivision and not the original owners or dedicators who cultivated portions of the roadway, and there is no claim by any who so cultivated said roadway, except the defendant, that they did so as a matter of right or with any intention of indicating a revocation of the dedication. Where there is a finding or, as here, indisputable evidence that a roadway dedicated to the use of the public is, as so dedicated, of a certain width, the fact, if it be a fact, that the main travel has customarily been confined to narrower limits than the width of the road as marked out and dedicated is not conclusive of the width of the road. (*Southern Pacific Co. v. City of Pomona*, 144 Cal. 339, [77 Pac. 929].) And in this case, as stated, the circumstances under which portions of the roadway were so used do not constitute the slightest evidence of an intention to revoke the dedication or to limit the width of the road to the track which has been customarily traveled.

It seems to us that it would be difficult to conceive how a much stronger case of constructive dedication than the present could well be developed. As is said in *Davidow v. Griswold*, 23 Cal. App. 188, [137 Pac. 619], so it is true here: "The owner has voluntarily placed himself in a position where equity will not permit him to deny thereafter that the said streets and parks are as represented by him; and, independent of the statement that they have been dedicated to public use, the other acts of the owner, considered in connection with the purchases under conditions mentioned, would preclude the said owner from contending, at least as far as said purchasers are concerned, that they are not streets and parks. *And if they are to be considered as really streets when we regard the rights of the purchasers, it is difficult to*

understand how their status would be changed when we regard the rights of the public generally."

Our conclusion is that the uncontroverted evidence and admitted facts beyond doubt show that there was in this case a fully completed dedication, that the findings are not justified, and that the judgment is, consequently, erroneous.

The answer admits that the defendant has excavated and otherwise obstructed the highway in question, and it follows from the conclusion at which we have arrived that he has done so without any legal authority.

The judgment is reversed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 24, 1914.

[Civ. No. 1473. First Appellate District.—June 30, 1914.]

A. M. FITZSIMMONS, Respondent, v. JOSEPH WILKS, Appellant.

ELECTIONS—INTENTION OF VOTER—ASCERTAINMENT FROM BALLOT ALONE.

As a general rule the intent of a voter must, in the first instance, be ascertained from the ballot itself, and such intent cannot, by proof of extrinsic circumstances, be shown to be other than that plainly and unequivocally expressed upon the face of the ballot.

ID.—EXTRINSIC CIRCUMSTANCES—ADMISSIBILITY TO SHOW INTENT OF VOTER.—But this rule is subject to the exception that where the intent of the voter is doubtful, the ballot must be construed as any other paper writing, and therefore evidence of facts and circumstances of public notoriety concerning the candidates and connected with the election may be resorted to for the purpose of ascertaining the voter's intention.

ID.—BALLOTS BEARING ONLY SURNAME OF CANDIDATE—WHETHER MAY BE COUNTED—FACTS AND CIRCUMSTANCES.—Ballots cast at a special election to fill the office of justice of the peace, upon which the voters, in writing in the name of a candidate, merely wrote his surname, are properly counted, if it appears that he was the only avowed, known, and active candidate by that name for the office, and

that the only other persons of that name residing in the township were his wife and two sons, who all endeavored to accomplish his election.

APPEAL from a judgment of the Superior Court of Monterey County. B. V. Sargent, Judge.

The facts are stated in the opinion of the court.

Daugherty & Lacey, and S. W. Mack, for Appellant.

H. C. Jorgensen, for Respondent.

LENNON, P. J.—At a special election held in Pacific Grove township, Monterey County, the plaintiff and defendant were candidates for the office of justice of the peace in the event that the then incumbent of the office should be recalled. The election resulted in the recall of the then incumbent, and upon a canvass of the returns, the defendant was declared elected to the office for the unexpired term. Subsequently plaintiff instituted proceedings in the superior court of Monterey County, under the provisions of part III, title II of the Code of Civil Procedure, contesting the right of the defendant to the office. The lower court rendered and entered judgment in favor of the plaintiff, declaring him to have been elected to the office, and directing that a certificate to that effect be issued to him by the county clerk. The defendant has appealed from the judgment.

A recount in open court of the admitted legal ballots cast at the election in question disclosed beyond dispute that one hundred and seventy-six votes were cast for A. M. Fitzsimmons, the plaintiff; two hundred and seventeen for Joseph Wilks, the defendant; and three votes for one R. M. Fitzsimmons. In addition, however, to the undisputed ballots, the recount showed that there were forty-nine ballots cast at the election, bearing merely the surname "Fitzsimmons," which, over the objection of the defendant that it was impossible to ascertain for whom they were intended, were admitted in evidence and counted for the plaintiff, thereby increasing his total vote to two hundred and twenty-five, and giving him a majority over the defendant of eight votes. The correctness of the court's ruling in counting these particular ballots is the only point presented for review.

We are of the opinion that under all of the particular and peculiar facts and circumstances surrounding the election in controversy, the lower court did not err in the ruling complained of.

Those facts and circumstances, as revealed by the bill of exceptions accompanying the judgment-roll, may, in so far as they are pertinent to the point under discussion, be briefly stated as follows: The plaintiff became a candidate for the office in question by simply making an announcement of his candidacy and personally soliciting the support of voters throughout the township in which the election was held. His candidacy was announced daily for a period of about thirty days preceding the election, in two daily newspapers printed and published in Monterey County, and which had in the aggregate a regular daily circulation of four hundred and ninety-five copies in the township in which the election was held. Prior to and at the time of the election, there were but four persons bearing the surname Fitzsimmons residing in the township, all of whom were duly registered electors and eligible to the office of justice of the peace. They were the plaintiff, A. M. Fitzsimmons, his wife, Mary J. Fitzsimmons, and his two sons, R. M. Fitzsimmons and E. W. Fitzsimmons. The plaintiff, however, was the only one person of the name of Fitzsimmons who sought the office in question and announced his candidacy therefor; and all the afore-said members of his family sought and endeavored to bring about his election. The surname Fitzsimmons was written upon each of the forty-nine ballots in question by the voter casting the same. It does not appear in the bill of exceptions or elsewhere in the record how or in what manner the defendant became a candidate for the office in question; that is to say, the record before us does not show whether the defendant was nominated for that office by petition or otherwise, or whether he, as did the plaintiff, merely announced his candidacy and trusted to the voters to write his name upon the ballots. Incidentally it appears that R. M. Fitzsimmons, who, notwithstanding that he was not a candidate for the office, received three votes, had for four years held the office of city treasurer of Pacific Grove, and had been defeated for that office at an election held in June, 1912.

It is the general rule that the intent of a voter must be in the first instance ascertained from the ballot itself; and that

such intent cannot, by proof of extrinsic circumstances, be shown to be other than that plainly and unequivocally expressed upon the face of the ballot. (*Maddux v. Walthall*, 141 Cal. 412, [74 Pac. 1026].)

This general rule, however, is subject to the exception that where the intent of the voter is doubtful, the ballot must be construed as any other paper writing; and therefore evidence of facts and circumstances of public notoriety concerning the candidates and connected with the election may be resorted to for the purpose of ascertaining the intention of the voter. (*Rutledge v. Crawford*, 91 Cal. 526, [25 Am. St. Rep. 212, 13 L. R. A. 761, 27 Pac. 779]; *Payne's Law of Elections*, sec 550.) Section 1205 of the Political Code provides that an elector may vote "for a candidate or person whose name is not printed on the ballot by writing a name for such office in the blank column" left therefor. The plaintiff, A. M. Fitzsimmons, was the only person of that name who was an avowed, known, and active candidate for the office in controversy. There was no evidence to show that any person by the name of Fitzsimmons other than the plaintiff, or that any member of the plaintiff's family, was known or understood by the electors of the township to be a candidate for the office; and in the absence of competent evidence to the contrary the presumption must be that the electors intended to vote for the only Fitzsimmons who was either known to or heard of by them as a candidate for that office. It is a fair inference from all the facts and circumstances of the present case that the forty-nine voters who wrote in the name of Fitzsimmons in the blank space left in the ballot for voting for the office of justice of the peace, intended thereby to vote for the only Fitzsimmons who was announced and known as a candidate for the office. This inference is fortified, we think, by the fact that the only other persons bearing the name of Fitzsimmons and residing in the township in which the election was held, were the wife and two sons of the plaintiff, all of whom sought and endeavored to accomplish the election of the plaintiff. It is not improbable that the three voters who cast their votes for R. M. Fitzsimmons had in mind the plaintiff, because he was the only person by the name of Fitzsimmons residing in the township who was a candidate for that office. However that may be, having written upon their ballots the surname and initials

of a person who resided within the county and who was eligible to the office, the law conclusively presumes that those voters intended to do that which they actually did. But assuming, aside from the presumption of law, that these voters actually intended to vote for R. M. Fitzsimmons and not for the plaintiff, it does not necessarily follow that there exists such an uncertainty as to the intent of the forty-nine voters who merely wrote in the name of Fitzsimmons on their ballots, as would preclude such ballots from being counted for the plaintiff. Of course, if R. M. Fitzsimmons as well as the plaintiff, A. M. Fitzsimmons had been an avowed and announced candidate for the office, the uncertainty as to which Fitzsimmons the forty-nine ballots in controversy were intended for would have been so pronounced as to require a ruling refusing to count them at all. No such situation, however, confronts us in the present case.

The judgment appealed from is affirmed.

Richards, J., and Kerrigan, J., concurred.

[Crim. No. 226. Third Appellate District.—June 30, 1914.]

THE PEOPLE, Appellant, v. H. L. STRICKLER, Respondent.

INTOXICATING LIQUORS—LOCAL OPTION LAW—PROHIBITION OF SALE OF NONINTOXICATING LIQUORS.—The legislature did not intend, by the enactment of the Wyllie Local Option Law (Stats. 1911, p. 599), to make it unlawful for one to engage in the business of selling non-intoxicating liquors; it was not the legislative intent to contraband the traffic in spirituous, vinous or malt liquors possessing no intoxicating quality. The legislature aimed the shafts of its denunciation solely against any liquors the use of which would produce intoxication, and, by specifying the quantity of alcohol which, when used in liquors, would bring them within the condemnation of the statute, it intended to and established a test applicable to all liquors the sale of which was designed by the statute to be prohibited in any territory to which the law might appropriately be made applicable.

Id.—PURPOSE OF LOCAL OPTION LAW—INTERPRETATION OF SECTION 21.—The purpose of such local option law is to suppress drunkenness and traffic in intoxicating liquors in those subdivisions where its

operation is invoked, and the rule of *ejusdem generis* is properly applied to section 21 of the act, which provides that "the term 'alcoholic liquors' as used in this act shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contain one per cent, by volume, or more, of alcohol and which is not so mixed with other drugs as to prevent its use as a beverage."

ID.—RULE OF EJUSDEM GENERIS—MEANING AND SCOPE.—The rule of *ejusdem generis* simply means that "general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general." Otherwise stated, "where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration, the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to or different from, those specifically enumerated."

ID.—LIMITATIONS ON RULE—INTENTION OF LEGISLATURE—GIVING EFFECT TO EVERY PART OF STATUTE.—This rule of construction is by no means of universal application, and its use is to carry out, not to defeat, the legislative intent. It must yield to another salutary rule of construction, namely, that every part of a statute should, if possible, be upheld and given its appropriate force.

ID.—VIOLATION OF LOCAL OPTION LAW—INSUFFICIENCY OF INFORMATION TO CHARGE.—An information charging a violation of the Wyllie Local Option Law, which avers that the liquor therein alleged to have been kept for sale by the defendant contained less than the quantity of alcohol specified in section 21 of the act, namely, one per cent, fails to state an offense under the statute.

APPEAL from a judgment of the Superior Court of Colusa County. H. M. Alberty, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Appellant.

Ben Berry, for Respondent.

HART, J.—The information in this case, purporting to accuse the defendant of a violation of the so-called Wyllie Local Option Law, reads as follows:

"The said H. L. Strickler on the 7th day of March nineteen hundred and thirteen at and in the County of Colusa, state

of California, and prior to the filing of this information did willfully and unlawfully keep and conduct in the town of Arbuckle and within the boundaries of first supervisor district of said Colusa County, state of California, a certain place where alcoholic liquors were by him then and there sold, served and distributed within the boundaries of said district; that said first supervisor district was then and there no-license territory; that said place was not then and there the home of said defendant; that said alcoholic liquors were not and none of them was then and there manufactured by defendant or by any other person on the said premises and place; that said alcoholic liquors were not then and there sold, served or distributed to or by a registered pharmacist, nor for medicinal purposes only upon a prescription by a duly licensed physician, nor for sacramental purposes; that said alcoholic liquors were then and there malt liquor containing less than one per cent by volume of alcohol, to wit: ninety-five hundredths of one per cent per volume of alcohol."

The defendant demurred to said information on the ground that the same does not state a public offense under the law referred to. The court sustained the demurrer and dismissed the information, and this appeal is by the people from the judgment thereupon entered.

Section 13 of the Local Option Law declares it to be unlawful "for any person, corporation, firm, association, or club, as principal, agent, employee, or otherwise, within the boundaries of any no-license territory, to sell, furnish, distribute or give away any alcoholic liquors, except as provided in section 16 hereof."

Although not material to this inquiry, it may be stated that the exceptions provided in section 16 include the permission to serve intoxicating liquors in one's home to the members of his family or to his guests as an act of hospitality; the sale of such liquors by pharmacists for medicinal purposes; the use of wine in religious services, and the sale thereof by pharmacists for such use; the storage of such liquors, provided they are not distributed in no-license territory, and the keeping of such liquors on premises where manufactured, and the shipping of the same into territories where the liquor traffic is permitted by law to exist.

Section 21 of said act provides that "the term 'alcoholic liquors' as used in this act shall include spirituous, vinous

and malt liquors, and any other liquor or mixture of liquors which contain one per cent by volume, or more, of alcohol and which is not so mixed with other drugs as to prevent its use as a beverage."

The contention of the defendant is that, inasmuch as the information declares that the malt liquors, with the alleged illicit keeping and selling of which he is charged, contained a less quantity of alcohol than that specified in section 21 of said act as applied to "any other liquor or mixture of liquors," etc., to wit: one per cent by volume, or more, no offense under said law is stated against him. The argument is that the general language of section 21, to wit: "and any other liquor or mixture of liquors," etc., must be examined by the light of the maxim, *noscitur a sociis*, and that, as so viewed, it must be held that the provision as to the quantity of alcohol that must be present in such liquors to bring them within the interdictions of the statute includes those liquors *ejusdem generis*, specially enumerated by the language immediately preceding it.

The position of the attorney-general is that the special language of said section is not qualified or in any degree controlled by the general language thereof, but that, by the specific enumeration in said section of spirituous, vinous and malt liquors, the legislature intended such liquors to fall under its ban regardless of whether they do or do not in fact contain alcohol. In other words, it is the contention of the people that the intoxicating character of "spirituous, vinous and malt liquors," as so enumerated in the statute, has been established by the legislature itself, and that it is not for the jury to revise the judgment of the legislature upon that matter and so determine whether such liquors are or are not in fact intoxicating. (*State v. Fredericks*, 101 Me. 37, [115 Am. St. Rep. 295, 8 Ann. Cas. 48, 6 L. R. A. (N. S.) 186, 63 Atl. 535].)

In the case of *People v. Mueller*, No. 231 (18 Cal. App. Dec., p. 220), this court was called upon to consider the propositions above stated, and we there expressed the opinion that, while in charging the offense of selling or keeping for sale spirituous, vinous or malt liquors, it was not necessary to allege that such liquors contained the amount of alcohol specified in section 21, a conviction could not be sustained under such an indictment unless such liquors were shown to

be intoxicating. This conclusion was reached mainly from the proposition, declared in the opinion in said case, that the terms "spirituous," "vinous" and "malt," as generically designating certain kinds of liquors, must have been used by the legislature in their popular sense—that is to say, that they were used to describe, generically, those alcoholic liquors commonly known as "spirituous," "vinous" and "malt," and which, it is known, will produce intoxication. The Mueller case was, after judgment here, ordered transferred to the supreme court for hearing, and it is now pending in that court.* Therefore, whether the intoxicating character of spirituous, vinous and malt liquors must be alleged in an indictment or information, where the charge is of selling or keeping them for sale and the accusatory pleading, following the language of the statute, designates them by their generic names, is a question which will doubtless be definitively determined by the supreme court in the case referred to and which, therefore, need not be considered here. We are still of the opinion, however, that the legislature did not intend to make it unlawful for one to engage in the business of selling non-intoxicating liquors. In other words, it is not reasonable to suppose that it was the legislative intent to contraband the traffic in spirituous, vinous or malt liquors possessing no intoxicating quality. To the contrary, it seems very clear, when we consider the ultimate object of the Local Option Law, that the legislature thus aimed the shafts of its denunciation solely against any liquors the use of which would produce intoxication, and that, by specifying the quantity of alcohol which, when used in liquors, would bring them within the condemnation of the statute, it intended to and did establish a test applicable to all liquors the sale of which was designed by the statute to be prohibited in any territory to which the law might appropriately be made applicable. This conclusion is arrived at by a view of section 21 of the act by the light of the rule of construction, *ejusdem generis*, above referred to. In its practical application, this rule simply means that "general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less

*Since this opinion was rendered, the case of *People v. Mueller* has been affirmed by the supreme court. The opinion of the supreme court is reported in 168 Cal. 526, [143 Pac. 750].

general." (3 Words and Phrases Judicially Defined, p. 2328.) Or, as this maxim was stated by Lord Tenterden (21 Am. & Eng. Ency. of Law, p. 1012): "Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to or different from, those specifically enumerated." This rule of construction is by no means of universal application, and its use is to carry out, not to defeat, the legislative intent. It must yield to another salutary rule of construction, viz.: that every part of a statute should, if possible, be upheld and given its appropriate force. (*Misch v. Russell*, 136 Ill. 22, [12 L. R. A. 125, 26 N. E. 528].) But, in this case, since it is plainly manifest, as stated, that the purpose of the Local Option Law is to suppress drunkenness and consequently the traffic in intoxicating liquors in those subdivisions where its operation is properly and legally invoked, the rule of *ejusdem generis* may be applied to the construction of section 21 without doing violence to or rendering inoperative any part of said section or of the law. Indeed, a construction of section 21 by the light of that doctrine will manifestly lead to the upholding of all the provisions of the law agreeably to the evident legislative design at the bottom of its enactment.

Thus, in a written opinion, the learned trial judge viewed the proposition submitted here and so concluded that the information by reason of its declaration that the liquor therein charged to have been kept for sale by the defendant contained less than the quantity of alcohol specified in section 21, failed to state an offense under the statute. Said opinion is appended to the brief of the defendant. We approve the opinion, both for its reasoning and its conclusion, and we, therefore, adopt the following part thereof as a part of this opinion:

"A great many cases from other jurisdictions are cited in support of the contention that the words spirituous, vinous and malt liquors have a fixed, definite meaning and are conclusive of the fact that such liquors contain alcohol and hence

are alcoholic and intoxicating within the contemplation of the statute.

"I find some conflict in the authorities upon this question. For example, the courts are in conflict as to whether beer is *per se* a malt or intoxicating liquor.

"It seems to be an open question in many jurisdictions as to whether courts will take judicial notice that pure alcohol is an intoxicating liquor within the meaning of the laws regulating and prohibiting sales of various classes of liquor. The weight of authority, however, seems to be that beer is malt and an intoxicating liquor. The cases cited by the district attorney seem to be fairly distinguishable from the case before us. Whether such cases may be considered as in point will depend somewhat upon the statutory provisions under consideration. Had the statute stopped with the words 'spirituous, vinous and malt liquors' without any general or qualifying words added thereto, then the authorities referred to would clearly be in point, and the sale of such liquors would be prohibited regardless of the alcoholic content of the liquor. But the following words just quoted, separated by only a comma, and this separation may be dispensed with, are the words 'and any other liquor, which contains one per cent by volume, or more, of alcohol.'

"Shall these concluding words be treated as an wholly independent clause of the statute, having no reference to the immediately preceding language of the same section, or shall they, as general words, be considered as relating back to and, in a sense, limiting and qualifying the particular words preceding them?

"These provisions and all other provisions of the statute must be taken together and be considered as a whole in order to arrive at the true intent and meaning of the law and law-makers. This is a fundamental rule of statutory construction.

"Grammatical construction and punctuation may be ignored and even clauses of the statute may be transposed and rearranged in order to ascertain and give effect to the true intent and meaning of statutory enactments.

"The act is a local option law; its operation and enforcement are made to depend upon the vote of the people in a given territory. The first clause of the title of the act is, 'An act to provide for the regulation of the traffic in alco-

holic liquors by establishing local option.' The proposition petitioned for and to be submitted to the electors is, 'Shall the sale of alcoholic liquors in this (supervisory) district be licensed?' If a majority vote on this proposition be in the negative, it is then made the duty of the board of supervisors to declare that the given territory is 'No-license territory,' and thereafter it shall be unlawful for any person in such territory (with certain exceptions, not material here) to sell alcoholic liquors. After all these (and other) provisions, is section 21 of the act, as above quoted, which defines the term alcoholic liquors, and provides they shall include spirituous, vinous and malt liquors and any other liquor containing one per cent, or more, of alcohol.

"From all these provisions, and from the means provided for making them effective, it seems clear that the act was intended to close saloons and to prevent drunkenness. While one purpose of the act, as disclosed in its title, is to regulate the traffic in alcoholic liquors, its main and chief purpose is to close saloons and prevent drunkenness. Alcohol is the intoxicating element or ingredient in spirituous liquor.

"If not intended to close saloons and to prevent drunkenness why submit the proposition to the electors of local territory under the proposition of license or no license? What the petitioners for the election desired and what the electors, in fair contemplation of the act, believed they were voting upon was 'Shall the sale of intoxicating (alcoholic) liquors which contain more than one per cent of alcohol be licensed?'

"It is not believed that the law, or law-makers or electors, intended to permit the sale of one kind of liquor which contained less than one per cent alcohol and to prohibit the sale of another and equally harmless liquor (malt) which contained no greater quantity of alcohol.

"No reason can be found why such discrimination should be made as between two equally harmless liquors, that is to say, harmless as to alcoholic content. To so hold would be to make the provisions of the statute inconsistent and inharmonious.

"Under the principles and authorities above stated a statute should receive such consideration, if possible, without doing violence to its terms, as will render its provisions consistent and in harmony with each other, and at the same time

to give effect to the real purpose and intent of the enactment.

"This is a criminal prosecution, and it is believed the law should receive a liberal construction, according to its true import and purpose and within the spirit of its provisions, rather than a strict technical construction. The spirit and not the letter of the law should control in such cases."

For the reasons herein stated, the judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 28, 1914.

[Civ. No. 1332. First Appellate District.—July 1, 1914.]

CLEM H. SEALS et al. Respondents, v. O. W. DAVIS,
Appellant.

VENDOR AND VENDEE—RESCISSION BY VENDOR—ACTION BY VENDEE TO RECOVER MONEY PAID—PAROL EVIDENCE OF WAIVER AND ESTOPPEL.

Where the vendees under a contract to purchase real estate bring an action to recover the money they have paid, on the ground that the vendor has rescinded the contract, they may introduce parol evidence to show a waiver by the vendor of performance of certain provisions of the contract and an estoppel against his claim of forfeiture.

ID.—PLEADING—COMPLAINTS STATING TWO CAUSES OF ACTION—FINDINGS.

If in such action the complaint contains two counts, the first alleging that the plaintiffs have performed all the obligations on their part under the contract and that the defendant has sold the property to a third person without any default on their part, and the second in the form of a common count for money had and received, the question whether a finding that the averments of the first count are true is supported by the evidence becomes immaterial in the presence of proofs of the second cause of action.

ID.—RESCISSION OF CONTRACT—ACTION FOR MONEY HAD AND RECEIVED.

When a vendee seeks to recover money he has paid upon a contract of sale which the vendor has attempted to rescind, he may accept such rescission, and bring his action in the form of the common count for money had and received by the vendor to his use and benefit.

ID.—WAIVER AND ESTOPPEL—PLEADING AND PROOFS.—In such an action the plaintiff is not bound to anticipate the defendant's plea of his

right to work a rescission of the contract, with the resultant right of forfeiture of the payments which were made under its terms, based upon the plaintiff's failure to perform certain of its conditions, and to plead in advance of these affirmative defenses matter of waiver or estoppel; but the plaintiff may rely upon the replications which the code makes for him, and proffer his proof of waiver or estoppel upon the trial of the case.

ID.—ESTOPPEL OF VENDOR—SUFFICIENCY OF EVIDENCE—MATERIALITY OF FINDING.—In this action by vendees to recover money they have paid, on the ground that the vendor has rescinded the contract of sale, there is sufficient evidence to have justified the trial court in finding that the defendant was estopped by his own acts and conduct, especially with reference to the matters referred to in his letter regarding the placing in escrow by the plaintiffs of their quitclaim deed to the property, and hence that the defendant could not be heard to assert that the plaintiffs had not performed the conditions of the contract to be by them performed; and if this be true, the finding of the court as to whether the plaintiffs had or had not performed the conditions of the contract becomes an immaterial factor in the case.

APPEAL from a judgment of the Superior Court of Fresno County. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

M. B. Harris, and L. L. Cory, for Appellant.

Geo. Cosgrave, and L. B. Hayhurst, for Respondents.

RICHARDS, J.—This is an appeal from a judgment in favor of the plaintiffs for the recovery of the sum of one thousand two hundred and fifty dollars, claimed to be due from the defendant as the result of the rescission of a contract for the sale of a certain piece of real estate by the defendant to the plaintiffs, the amount so recovered by the plaintiffs being the first payment made by them on account of said transaction.

The evidence, which is practically uncontradicted, shows the following state of facts: On April 10, 1911, the plaintiffs and the defendant entered into a contract for the purchase and sale of a tract of land, embracing eighty acres and lying in Merced County, for the purchase price of six thousand dollars, of which the plaintiffs were to pay, and did pay, the sum of one thousand two hundred and fifty dollars cash.

They also assumed the payment of an outstanding lien of one thousand six hundred dollars, secured by a deed of trust upon the property executed by the seller, and bearing interest at six per cent per annum. The balance of the purchase price was to be paid in annual installments of five hundred dollars each, beginning March 15, 1912. There were also certain water assessments accruing during 1911, which the purchasers agreed to pay. In case of default of any payments to be made under the contract, the seller could declare the contract at an end and retake possession of the property, in which case all payments which had been made by the purchasers were to be retained by the seller as reasonable compensation for the use and rental of the property during its incumbency by the purchasers. The plaintiffs took possession of the land in April, 1911, and remained until the fall; but apparently did not make much of a success at farming, and hence were not able to make the payments of interest upon the obligation secured by the deed of trust and of the water assessments, and were on the point of leaving the property when the parties to the contract met and, according to the plaintiffs' testimony, had an oral agreement, by which the defendant was to keep the interest on the trust-deed and the water assessments paid up until the following March, and that the plaintiffs were not to be in default until that time. That some such arrangement was made can be gathered from the terms of a letter which the defendant wrote the plaintiffs during October, 1911, which contained the proposition that the plaintiffs should execute a release of their contract and place the same in escrow with a Fresno bank, in consideration of which they were to have possession of the land until the following March in order to allow them to dispose of the property and get their money out of it. Upon receipt of this letter the plaintiff C. H. Seals saw the defendant and agreed to its terms. It was understood that the defendant was to have his own lawyer draw up the form of the document to be placed in escrow, and he got from the plaintiffs their copy of the original contract for that avowed purpose. Thereafter on several occasions during the next few weeks the plaintiff C. H. Seals came to Fresno and saw the defendant with respect to having the escrow papers signed, but the defendant put him off on various pretexts, and quieted his fears of losing his interest in the land by assuring him that he could not be

beaten out of what interest he had in it so long as his name was on the contract. The plaintiffs also wrote the defendant one or possibly two letters in regard to the papers so to be prepared and signed, but got no reply; and finally during December came over from Coalinga, where they were living, and met the defendant, when he told them that he would have nothing more to do with them, and when they also learned that he had sold the property to another purchaser for a larger sum than their original purchase price. Thereupon they brought this action.

There are some slight conflicts in the evidence with reference to the foregoing facts, but these were resolved by the lower court in favor of the plaintiffs, and with its discretion in that respect we shall not undertake to interfere.

The first contention of the appellant relates to the alleged error of the court in the admission of the testimony of the plaintiffs with respect to the oral understandings with the defendant affecting their liability under the written contract, and referring especially to the time of performance of certain of its obligations. It is the theory of the appellant that this oral evidence was offered in an effort to change or modify the terms of a written contract, and that it was inadmissible for such purpose under many authorities cited by his counsel, stating well established rules of law. There can be no quarrel with the authorities cited by appellant to sustain this legal proposition; but the difficulty lies in the fact that the evidence was not offered or admitted for the purpose indicated by appellant, but was offered by the respondents, and properly admitted by the court, as evidence tending to show that the appellant had waived the performance of those portions of the plaintiffs' obligation under the written contract, the failure to do which was later held by the appellant to have put them in default; and also as evidence of acts and conduct on the part of the defendant which, if true, would operate as an estoppel to his claim of forfeiture of the plaintiffs' first payment under such contract, based upon their default in the performance of its terms. It requires no authorities to sustain the proposition that the proof of such waiver and estoppel may be made by parol.

The plaintiffs brought their action in two counts, the first of which was based upon allegations to the effect that the plaintiffs had performed all the obligations of the written

contract to be by them performed; and that the defendant, having attempted to work a rescission of the contract through the sale of the property to a third person, in the absence of any default on their part, the plaintiffs were entitled to accept such rescission and bring suit to recover their payment. The second alleged cause of action was in the form of a common count for money had and received by the defendant to the plaintiffs' use. The appellant contends that the findings of the court to the effect that the averments of the first count were true, was not supported by the evidence. This might seem to raise the question as to whether proof of the waiver of certain terms and conditions of the contract would operate to justify a finding that the plaintiffs had performed such obligations. But conceding this to be true under the cases cited by appellant, the presence and proofs of the plaintiffs' second cause of action would seem to make that question immaterial to this case; for even if the court erred in its aforesaid finding as to the facts proven in support of the first count, its judgment will still be sustainable under the second count based, as it evidently is, upon the accepted proofs of the plaintiffs establishing a waiver of their unperformed obligations, and an estoppel against the assertion of their default therein by the defendant as a ground of forfeiture of the money payment which the plaintiffs seek to recover. In this connection, however, the appellant urges that the plaintiffs were not entitled to offer proof of either a waiver of their unfulfilled obligations under the contract, or of the estoppel of the defendant's right to insist upon them, because of the plaintiffs' failure to tender either of these issues by direct averments in their complaint. The answer to this proposition again is that in the second count of the plaintiffs' complaint consists the saving grace of their pleading. When a plaintiff seeks to recover money which he has paid upon a contract which the defendant has attempted to rescind, he may accept such rescission, and bring his action in the form of the common count for money had and received by the defendant to his use and benefit. (*Glock v. Howard etc. Co.*, 123 Cal. 1, [69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713]; *Duncanson v. Walton*, 111 Cal. 516, [44 Pac. 174]; *Joyce v. Shafer*, 97 Cal. 335, [32 Pac. 320]; *Chatfield v. Williams*, 85 Cal. 518, [24 Pac. 839]; *Carter v. Fox*, 11 Cal. App. 67, [103 Pac. 910].) In such an action the plaintiff is not bound

to anticipate the defendant's plea of his right to work a rescission of the contract, with the resultant right of forfeiture of the payments which were made under its terms, based upon the plaintiff's failure to perform certain of its conditions, and to plead in advance of these affirmative defenses matter of waiver or estoppel; but in such a case the plaintiff may rely upon the replications which the code makes for him; and proffer his proof of waiver or estoppel upon the trial of the case. (Sutherland on Code Pleadings, sec. 235 and cases cited.) In the case at bar there is sufficient evidence to have justified the court in finding that the defendant was estopped by his own acts and conduct, especially with reference to the matters referred to in the letter of the defendant regarding the placing in escrow by the plaintiffs of their quitclaim deed to the property, and hence that the defendant could not be heard to assert that the plaintiffs had not performed the conditions of the contract to be by them performed; and if this be true, the finding of the court as to whether the plaintiffs had or had not performed the conditions of the contract becomes an immaterial factor in the case.

The judgment is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1320. First Appellate District.—July 2, 1914.]

J. F. COLLOM, Respondent v. ROOS BROS., Incorporated,
Appellant.

BROKERS—COMMISSION FOR LEASING PROPERTY—TRANSFER OF LEASE—

EXECUTION OF NEW LEASE.—Where a corporation lessee assigns the lease, which contains an option of renewal, to another corporation, the transferee is not bound, upon the expiration of the term and the procuring by it of a new lease, to continue to pay to the broker who procured the original lease the monthly amount which he was to receive during the original term and its extension in case of a renewal, although the stockholders of the transferee are also stockholders of the transferor. The new lease cannot be considered a renewal of the old lease, so as to continue the brokers right to monthly payments.

ID.—RENEWAL OF LEASE—WHETHER NEW LEASE WILL BE REGARDED AS.

While it is true that a new lease made between the immediate parties to a former one containing the privilege of a renewal, may be varied as to its terms and still be held to constitute a renewal thereof, this flexibility in the exercise of the privilege cannot be held to apply as between the lessor and a transferee of the first lease.

ID.—CORPORATIONS—LIABILITY OF STOCKHOLDERS WHO BELONG TO TWO COMPANIES.—

The mere fact that the persons who are stockholders of one corporation doing one kind of business, are also stockholders of another corporation engaged in another and distinct line of business, is not in itself sufficient to impute liability to one for the acts of the other, in the absence of some direct proof of a fraudulent design in the carrying out of which the two entities are controlled and act as one.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Robert M. Clarke, Judge presiding.

The facts are stated in the opinion of the court.

Heller, Powers & Ehrman, Sidney M. Ehrman, and Walter Rothchild, for Appellant.

John Ralph Wilson, Harding & Monroe, and Robert H. Borland, for Respondent.

RICHARDS, J.—This is an appeal from a judgment in favor of plaintiff for the sum of \$844.10, and from an order denying the defendant's motion for a new trial. The essential facts are these: The plaintiff in April, 1906, was a real estate broker in the employ of Madison & Burke, a real estate firm in San Francisco. After the earthquake and fire of that year, knowing that Mrs. B. McDermott was the owner of certain property on Fillmore Street which she desired to rent, and having learned that the defendant wished to lease the property, the plaintiff went to the home of Mrs. McDermott in Oakland on April 26, 1906, and obtained from her an option for a lease of the premises for three years, with a privilege of renewal, and at a rental of five hundred dollars a month, the option to expire on May 1st. Two days later he made an agreement with Roos Bros., by which he agreed to procure a lease of the premises for them, for three

years, with a privilege of renewal, at a rental of six hundred dollars per month, and by which Roos Bros. agreed to pay Collom "out of the monthly rental of \$600 per month to be reserved in said lease, such amount as the owner of said premises may allow him, the same to be in full of all commissions and other services rendered and to be rendered by him as above." Having this agreement Collom then went back to Mrs. McDermott, and obtained the execution by her of a lease of the property to Roos Bros., for the term of three years, with an option of renewal for seven years additional for the sum of six hundred dollars a month. He also obtained from Mrs. McDermott a letter addressed to Roos Bros., in which the latter were "authorized to pay on account to J. Frank Collom, his heirs or assigns, the sum of one hundred dollars per month during the full term of said lease and any renewal thereof for the period of seven years additional as therein provided." This letter was presented to Roos Bros. at the time of the execution of the lease on their part, and their acceptance of its terms was evinced by the payment to Collom for a time thereafter of the monthly sum of one hundred dollars out of the rents specified in their lease.

Roos Bros. is, and prior to the date of the lease in question was, a corporation composed of Leon L. Roos, Robert L. Roos, George H. Roos, Adolph Roos, and Achille Roos. Immediately after the earthquake and fire this corporation had taken a number of leases of real estate in San Francisco; but in the month of July, 1906, a new corporation was formed, known as Roos Realty Company, which then took over and thereafter conducted separately the real estate branch of the business of Roos Bros., with which the two elder members of the former corporation did not wish to be further concerned. The stockholders of the new corporation were Leon L., Robert L., and George H. Roos; and in it the two elder members of the Roos family, Adolph and Achille, had no interest. To this new corporation the older one of Roos Bros. assigned all of its interest in these several leases, including that made by Mrs. McDermott, and thereafter the Roos Realty Company paid to Mrs. McDermott the portion of the rental to which she was entitled under the foregoing agreements, and also paid to the plaintiff Collom his share thereof in accordance with Mrs. McDermott's direction. In the month of February, 1909, Roos Bros. notified Mrs. Mc-

Dermott that the privilege of renewal in the lease of April, 1906, would not be exercised. A short while later negotiations were entered into between George H. Roos, representing the Roos Realty Company, and the owner of the property, for another lease of the premises, as a result of which a new lease was entered into between Mrs. McDermott and George H. Roos, whereby, for a rental of six hundred dollars a month, the latter leased the property for a term of three years and eight months from the end of the term of the former lease, with the privilege of renewal of the new lease for a further term of three years and four months from the end of the stated term thereof. Upon the execution of this instrument and the expiration of the former lease Mrs. McDermott instructed Roos Bros. in writing to cease paying Collom any further sum. The payments to Collom accordingly ceased on May 1, 1909; and in November, 1909, he brought this action.

In his third amended complaint the plaintiff, after stating the substance of the option and agreements out of which the first lease came into being, together with the direction of Mrs. McDermott to Roos Bros. as to the payment of the one hundred dollars a month to him during the term of said lease, and also the fact of the making of the later lease, proceeded to aver that George H. Roos, to whom the second lease ran, was a large stockholder and officer of Roos Bros. and was also a large stockholder and officer of Roos Realty Company; that the stockholders of Roos Realty Company are all stockholders of the defendant Roos Bros., and were all as such stockholders beneficially interested in the original lease, and were in fact the only stockholders of the defendant corporation who ever had any beneficial interest therein; that said second lease was taken in the name of George H. Roos as the agent and trustee of Roos Realty Company, and that the same was taken and held by said George H. Roos in the form of a new lease and not as a specific renewal of the lease of April, 1906, "as an attempt on the part of defendant to evade its liability under its contract with the plaintiff for the payment to him of one hundred dollars a month during any renewal of the former lease." In its answer to this third amended complaint the defendant admits that George H. Roos is a large stockholder both of the defendant and the Roos Realty Company; and admits that the stockholders of the Roos Realty Company are all stockholders of the defendant, and admits

that they were all as such stockholders interested in the first lease; but denies that they were the only stockholders so interested therein, and alleges that the other stockholders of the defendant were also interested in said first lease at the time of its execution and so continued to be until its transfer to the Roos Realty Company but not thereafter; the defendant also admits that George H. Roos took the second lease as trustee for the Roos Realty Company, but denies that the said last named lease was taken in the form of a new lease as an attempt on the part of the defendant to evade its liability to the plaintiff in the event of a renewal of the former lease; but on the contrary avers that the new lease constituted an entirely new and independent transaction with the owner of the property, and was in no sense a renewal of the old lease, but was different in time and terms from what such renewal would or could have been; that the old lease was not renewed, and hence that defendant's liability to the plaintiff ceased with its expiration on May 1 of 1909, and that the defendant owes the plaintiff nothing.

Upon the issues as thus formed the cause went to trial. The plaintiff introduced in evidence the several documents referred to in the history of the transaction; and thereupon and upon the admissions of the pleadings rested his case. The defendant moved for a nonsuit upon the ground of plaintiff's failure of proof, which motion the court denied, and to which the defendant duly excepted, and now assigns the same as error.

We think the defendant's motion for nonsuit should have been granted. The plaintiff's theory as to his right of recovery is predicated upon a twofold aspect of the facts as presented by the documentary proofs and by the admissions of the pleadings in the case. The first of these is that the defendant by its transfer of the first lease to the Roos Realty Company, transferred to it the right to enter into a renewal thereof, which, if consummated, would serve to bind the defendant to continue its payment of one hundred dollars monthly to the plaintiff during the term of such renewal; and that the new lease taken by George H. Roos as the agent and trustee of the Roos Realty Company constituted in fact such renewal. But while it may be conceded that the defendant, by its transfer of the first lease passed over to the Roos Realty Company the right to make a renewal of it by

which the defendant would be bound to continue its payments to the plaintiff, it does not follow that the new lease is, on its face and standing by itself to be considered to be a renewal of the former lease. It is made to a different person, representing a different entity from that of the former lessee. It is for a different term from that provided for in the privilege of renewal stipulated in the former lease. This is an essential variation; and while it is true that a new lease made between the immediate parties to a former one containing the privilege of a renewal, may, under the authorities, be varied as to its terms and still be held to constitute a renewal thereof, this flexibility in the exercise of the privilege cannot be held to apply as between the lessor and a transferee of the first lease. Otherwise the original lessee would be placed in a position where it would be bound by obligations to which it was not a party and differing from those which it would have consented to incur. In order, therefore, that this new lease, made between different parties and for a different term than the former one, might be held to be a renewal of it so as to bind Roos Bros. to a continuance of their payments to the plaintiff, it must either have been identical in terms with the original lease, or it must be aided by those proofs which the plaintiff in his complaint undertook to supply; that is to say, by evidence sustaining the plaintiff's averments that the second lease was taken in the form of a new lease and not as a specific renewal of the former one, in "an attempt on the part of the defendant to evade its liability under its contract with plaintiff," or, in other words, with the fraudulent design and effort on the part of the appellant to avoid its obligation; for this is what the averments of the plaintiff's complaint must be held to mean, although the plaintiff in his brief disclaims the intent to impute fraud to the appellant.

This branch of the plaintiff's case requiring averment in his complaint, and being traversed by the answer, of necessity demanded affirmative proof on the part of plaintiff at the trial; but this proof, essential to his case, the plaintiff utterly failed to produce, unless it is to be found in the documents which evidence the transaction, or in the admissions of the defendant's pleadings, or in both read together.

So far as the documents are concerned, they, in themselves, evince no such fraudulent intent or attempt as the plaintiff avers; and so far as the admissions of the pleadings go, the

only admission of the defendant which plaintiff urges as supporting this view of the case is the admission that the stockholders of Roos Realty Company, the corporation for whose benefit the second lease was made, were also stockholders of Roos Bros., the corporation named as lessee of the first lease and the transferer thereof to the later corporation. But this admitted fact, either taken alone or in connection with the documentary proofs, does not tend to disclose any fraudulent design or effort on the part of Roos Bros. to avoid its obligation to the plaintiff. It is not shown, or even contended, that these two corporations are one entity, even though all of the stockholders of Roos Realty Company are also some of the stockholders of Roos Bros. On the contrary, the pleadings and proofs of the plaintiff himself show that they are two different entities, having different holdings and engaged in distinct forms of corporate energy; that the latter corporation was organized to take over the real estate activities and investments of the former corporation which certain of its stockholders no longer wished themselves or it to be interested in; that it did so openly, and that thereafter its business and affairs were entirely separate from those of the earlier corporation; that these facts were known to the plaintiff at the time; and that during practically the entire term of the first lease he dealt with the Roos Realty Company as a separate entity and as the successor in interest in such lease of the former corporation. The mere fact that the same persons were stockholders of one corporation doing one kind of business, are also stockholders of another corporation engaged in another and distinct line of business, is not in itself sufficient to impute liability to one for the acts of the other in the absence of some direct proof of a fraudulent design in the carrying out of which the two entities are controlled and act as one. No such proof had been presented at the close of the plaintiff's case. This being the state of the record and the proofs when the plaintiff rested, we think the court erred in refusing to grant the defendant's motion for nonsuit at that stage of the trial.

The subsequent proofs cannot be said to have in any way strengthened the plaintiff's original case; and hence it follows that if the motion for a nonsuit should have been granted, the judgment which the court rendered and entered

at the close of the trial should be reversed, as well as the order of the court refusing to grant a new trial.

The judgment and order are reversed, and the cause remanded for a new trial.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 28, 1914.

[Civ. No. 1853. First Appellate District.—July 3, 1914.]

UNION LUMBER COMPANY (a Corporation), Respondent,
v. J. W. SCHOUTEN & COMPANY (a Corporation),
Appellant.

ACTION FOR GOODS SOLD AND DELIVERED—PLEADING—AMENDMENT OF COMPLAINT SO AS TO ADD ANOTHER COUNT.—Where a complaint merely states an action for goods sold and delivered, an amendment thereof setting forth two causes of action, the first being identical with that pleaded in the original complaint, and the second alleging an account stated, that there was an error therein subsequently discovered amounting to the sum claimed to be due under the first cause of action, and praying for equitable relief and judgment for such sum, does not state a new and independent cause of action, since both causes of action have the same identical purpose.

ID.—AMENDMENT OF COMPLAINT—WHAT CONSTITUTES NEW CAUSE OF ACTION—TEST.—A new count, offered under leave to amend, must be consistent with the former count or counts, that is, it must be of the like kind of action, and such as might have been originally joined with the others. It must be for the same cause of action, that is, the subject matter of the new count must be the same as the old; it must not be for an additional claim or demand, but only a variation of the form of demanding the same thing.

ID.—STATUTE OF LIMITATIONS—AMENDMENT OF COMPLAINT.—Since both complaints in such case are for the recovery of the price of the same lot of goods, the action itself, irrespective of the theory on which the right to recover is based, must be regarded, so far as concerns the statute of limitations, as having been commenced when the original complaint was filed.

1D.—ACCOUNT STATED—OMISSION OF ITEM—ESTOPPEL.—If in such case the omission to include the amount sought to be recovered in the claim originally presented was due to an oversight and mistake, which was either mutual or suspected by the defendant, the account stated did not work an estoppel, and the court is warranted in surcharging the account. An account stated does not bar a recovery for items not within the contemplation of the parties when the settlement was made.

1D.—DEFINITION OF ACCOUNT STATED—CONCLUSIVENESS UPON PARTIES—OPENING AND RE-EXAMINATION.—An account stated is an agreed balance of accounts; an account which has been examined and accepted by the parties. It does not, however, operate as an estoppel, and it may be impeached for fraud or mistake. If there has been any mistake, omission, accident, fraud, or undue advantage, by which the account is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. J. O. Moncur, Judge presiding.

The facts are stated in the opinion of the court.

L. H. Brownstone, for Appellant.

Charles A. Strong, and Charles E. Wilson, for Respondent.

KERRIGAN, J.—This is an appeal by the defendant from the judgment and from an order denying its motion for a new trial.

These are the facts of the case: For several years prior to the eighteenth day of April, 1906, the plaintiff and defendant were engaged in the lumber business, plaintiff as a manufacturer, and defendant as a retailer in the San Francisco market. Prior to the eleventh day of April, 1906, the plaintiff had sold the defendant at various times large quantities of lumber, and on that date sold and delivered to it a further quantity amounting in value to the sum of \$1121.06. June 9, 1906, the defendant, being unable to meet its obligations as they matured, made an assignment for the benefit of its creditors of its entire business. About the time of the assignment, the plaintiff presented its claim to the committee of creditors to whom the assignment had been made, for the sum

of \$5553.53, which was \$1121.06 less than the defendant actually owed plaintiff. This mistake and omission occurred by reason of the fact, so it was alleged and proved, that plaintiff's books were not completely written up or posted on said ninth day of June, 1906, owing to the confusion resulting from the fire and earthquake on the eighteenth day of April of that year. The creditors' committee paid plaintiff the sum of \$5553.53, and thereafter, the plaintiff, learning of the mistake just referred to, and the defendant having again resumed control of its business requested of defendant payment of said sum of \$1121.06, which payment the defendant having refused to make, this action was commenced, resulting in the judgment indicated.

The original complaint was for goods sold and delivered; and subsequently, a few months before trial, plaintiff, over an objection of the defendant, filed an amended complaint, setting forth two causes of action, the first being identical with that pleaded in the original complaint, and the second alleging an account stated, that there was an error therein, subsequently discovered, amounting to the sum claimed to be due under the first cause of action, and praying for equitable relief and judgment for said sum.

Defendant now asserts that permission to file the amended complaint containing the second cause of action should have been denied, for the reason, so it is stated, that it was wholly a new and different cause of action, and also for the reason that it appears that it was filed more than two years after the filing of the original complaint.

Neither of these objections is good. The amended complaint did not set up wholly a new and independent cause of action. Both causes of action were to recover the value of the same consignment of lumber, the charge for which, through an inadvertence, was omitted from the account as stated. Both causes of action had the same and identical purpose; hence the amended complaint cannot be held to have set forth a new cause of action. The authorities abundantly support this position. (*Born v. Castle*, 22 Cal. App. 282, [134 Pac. 347].) The test as to what constitutes a new cause of action is laid down in *Anderson v. Wetter*, 103 Me. 268, [15 L. R. A. (N. S.) 1003, 69 Atl. 110], as follows:

“The new count, offered under leave to amend, must be consistent with the former count or counts, that is, it must be of the like kind of action; and such as might have been originally joined with the others. It must be for the same cause of action, that is, the subject matter of the new count must be the same as of the old; it must not be for an additional claim or demand, but only a variation of the form of demanding the same thing.”

As both complaints were for the recovery of the price of the same lot of goods, the action itself, irrespective of the theory on which the right to recover is based, must be regarded as having been commenced when the original complaint was filed. There is no merit therefore in defendant's point that the Statute of Limitations had run against the cause of action set forth in the amended complaint. (*Bogart v. Crosby and Van Haren*, 91 Cal. 278, 281, [27 Pac. 603]; *Smullen v. Phillips*, 92 Cal. 408-411, [28 Pac. 442].)

The evidence clearly sustains the view that the omission to include the amount herein sought to be recovered in the claim originally presented was due to an oversight and mistake, which was either mutual or suspected by the defendant. In either event, the account stated did not work an estoppel, and the court was warranted in surcharging the account.

An account stated does not bar a recovery for items not within the contemplation of the parties when the settlement was made. (*Waldron v. Evans*, 1 Dak. 11, [46 N. W. 607]; *Clarke v. Kelsey*, 41 Neb. 766, [60 N. W. 138]; *Pavie v. Noyrel*, 5 Mart. La. (N. S.) 92; *Fox v. Sturm*, 21 Tex. 407.)

“The account stated is defined by Bouvier to be ‘an agreed balance of accounts; an account which has been examined and accepted by the parties. . . .’ It does not, however, operate as an estoppel, and it may be impeached for fraud or mistake. Judge Story says: ‘If there has been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined.’ ” (*Green v. Thornton*, 96 Cal. 67, 71, [30 Pac. 965].)

Defendant's points that the books of account were improperly admitted in evidence, and that the court failed to find

on the third and separate defense, are without merit, and for that reason will not be discussed.

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on July 31, 1914.

[Civ. No. 1409. Second Appellate District.—July 3, 1914.]

JOHN T. JOHNSTON et al., Respondents, v. TEJUNGA ROCK COMPANY (a Corporation), Appellant.

BROKERS—SALE OF ROCK—ACTION TO RECOVER COMMISSION—ESTOPPEL AGAINST DEFENDANT AFTER FULL PERFORMANCE.—In an action by brokers against a corporation to recover their commission for making a sale of crushed rock for the corporation, the corporation is estopped, after the transaction has been completely consummated, to defend on the grounds that the brokers were not authorized in writing to make the sale and that the road supervisors who purchased the rock for their county had no authority to represent the county.

APPEAL from a judgment of the Superior Court of Santa Barbara County and from an order refusing a new trial. S. E. Crow, Judge.

The facts are stated in the opinion of the court.

Flint, Gray & Barker, Gray, Barker & Bowen, and William A. Bowen, for Appellant.

Wm. G. Griffith, for Respondents.

CONREY, P. J.—The plaintiffs as partners bring this action against the defendant, a corporation, to recover money claimed as commissions for the sale of personal property. Defendant appeals from the judgment which was rendered in favor of the plaintiffs, and also appeals from an order denying a motion for a new trial.

In the complaint it is alleged that from the nineteenth day of May, 1911, until on or after the first day of September, 1911, the plaintiffs were agents employed by the defendant to sell and contract for the sale of crushed rock for the defendant for an agreed compensation of ten cents per ton; that on September 1, 1911, the plaintiffs as such agents contracted for the sale of and sold on behalf of the defendant to one Deaderick, supervisor of the first supervisor district of the county of Santa Barbara, acting under authority of the board of supervisors of said county, all of the road material, consisting of certain sizes of crushed rock, to be used on five and one-half miles of macadam road thereafter to be built in the Montecito Valley in said district at the price of \$1.30 per ton, to be delivered as specified, which contract was in writing and was signed on behalf of said defendant by Ben C. Brock, its superintendent thereunto duly authorized, and by the said Deaderick on behalf of said county; that thereafter, commencing on or about September 9, 1911, the defendant began delivery to said Supervisor Deaderick of said crushed rock under and pursuant to said agreement, and continued such delivery until the road was fully completed; that the total amount of rock so furnished was fifteen thousand eight hundred and ninety tons, and the amount of the agreed compensation of plaintiffs thereof at said rate of ten cents per ton was \$1,589. The answer of defendant contains a denial of the employment of plaintiffs and of the agreement for compensation and of the alleged agreement for sale of rock; denies that Ben C. Brock was authorized to execute any such agreement on behalf of the defendant; denies that the defendant delivered any material to said Deaderick under or pursuant to the alleged agreement; and denies that defendant agreed to pay any compensation to plaintiffs, or that any commission is due from defendant to plaintiffs on account of said transaction. The findings of the court on each of the disputed issues are in favor of the plaintiffs, and the defendant contends that the evidence is insufficient to support those findings.

During the year 1911, until about September 15th, one Frank G. Hogan was president and general manager of the Tejunja Rock Company and owned all of the stock, except a few shares which were distributed among four other persons to qualify them for the office of directors of the corporation.

S. M. Crawford was a director and was secretary; Ben C. Brock was a director and was employed as superintendent at the quarry of the company which is located in the county of Los Angeles. The company was active in the business of selling crushed rock and the duties delegated to Brock and Crawford were described in the testimony of Mr. Hogan as follows: "The management, or rather the handling of the orders, was left jointly to Mr. Brock and Mr. Crawford, as my representatives, with instructions that if anything came up of any magnitude at any time that they would consult with me before taking any action, in fact, I was consulted with time after time over the telephone and by repeated visits to the office. I told them to go ahead and make the business pay and to get out rock as cheap as they could, and sell it as high as they could. I never at any time gave to Mr. Brock authority to sell material independent of the approval of Mr. Crawford. The usual course of business in the sale of material called for the approval both of Mr. Crawford and Mr. Brock of all orders. The course of business, with reference to the sale of material prior to September 15, 1911, was, the material was to be gotten out and sold to the best possible advantage by Crawford or Brock. My understanding is, that they were both endeavoring to sell material and were acting in full knowledge of each other and consulting regarding the sales. That was the actual course of business." In May, 1911, and thereafter, the defendant was selling rock in Santa Barbara County, and on and after May 19th the plaintiffs acted as its local agents, engaged for that purpose by the defendant through Brock with the knowledge and consent of Crawford, and at an agreed commission of ten cents per ton on material sold through the agency of the plaintiffs. Sales to various purchasers were made from time to time and settled for on this basis. In August plaintiffs conducted certain negotiations with Supervisor Deaderick, having in view the furnishing of rock for the road work above mentioned. This was known to both Brock and Crawford. On September 1st the plaintiffs prepared in duplicate the document of which a copy is attached to the complaint and brought it to the office of defendant at Los Angeles. There it was signed in duplicate by Brock who mentioned that fact to Crawford, but Crawford did not read the papers. These were taken back

by Johnston to Santa Barbara, and on the next day were delivered by plaintiffs to Deaderick.

No record of the proceedings of the board of supervisors of Santa Barbara County concerning the Montecito road were shown in evidence, but Supervisor Deaderick was permitted to testify without objection thereto, that prior to September 1st the board of supervisors had advertised for bids for the proposed work and received no bids; had then re-advertised for two weeks and on the first Monday in September (September 4th) all bids were rejected, and Deaderick, who was supervisor for the district in which the Montecito road was located, was ordered by the board to proceed and complete that work. Within two or three days after September 4th Deaderick signed the alleged contract in duplicate and returned both copies to the plaintiffs. One of these copies remained in the possession of plaintiffs until the trial of this action. The other copy was delivered by Brock to an officer of the defendant on September 26, 1911. The evidence does not show when it was received by Brock, but does show that Brock's employment by the defendant ceased on or about September 15th, at which time Hogan completed a sale of all the stock of the corporation to new owners who were stockholders of a rival concern known as the Acton Rock Company. On September 15th one W. S. Heaton became vice-president of defendant and was employed as its sales agent. Both prior and subsequent to that time Heaton was sales agent for the Acton Rock Company.

The alleged contract provided that the vendor would furnish at least one hundred and fifty tons per day during the time of construction of the Montecito road. The evidence indicates that this would be approximately three full car loads per day. On September 6th the plaintiffs sent to the defendant an order for the first shipment and accompanied the same by a letter dated the previous day, referring to the same as "our order for the county of Santa Barbara, Miramar Switch; three (3) cars each day, until ordered stopped, beginning shipment at your earliest convenience." The letter then refers to Mr. Deaderick as supervisor in charge and gives further instructions as to the desired course of business respecting the shipments. There were some further orders and shipments made during the next few days. On September 23rd Mr. Heaton went to Santa Barbara in response to a sug-

gestion from A. R. Edmondson, the Santa Barbara agent of the Acton Rock Company who had now been engaged by Heaton as the Santa Barbara agent of both companies. A meeting then occurred at the office of the district attorney at which there were present, among others, Supervisor Deaderick, Edmondson, McComber, Heaton, and District Attorney Squier. Deaderick made some complaint that his orders for rock were not being filled, and Heaton stated: "We are not going to deliver the rock on any contract. We are not delivering you rock on any contract, . . . nor do we propose to pay 10c to McComber and Johnston." The alleged written contract was not produced and Heaton's uncontradicted testimony is that he had no knowledge of such contract at that time, except that Edmondson had told him that he had heard that "somebody had signed up," and that defendant had been paying ten cents per ton to the plaintiffs on rock sold by them. At that interview on September 23rd it was arranged that the defendant would proceed to deliver rock for the Montecito road for seventy cents, f. o. b. at the quarry. This was practically the same as \$1.30 at point of delivery, as the current freight rate was sixty cents per ton. Subsequently in December, Deaderick obtained a reduction of five cents per ton on the freight rate of which reduction the county obtained the benefit. Deliveries continued to be made until January, when the road was completed, and the total amount of rock delivered was as charged in the complaint and found by the court. Some of this rock was furnished by the Acton Rock Company from its plant at Acton, forty-three miles from Tejunja, and for some of it of a certain quality an additional price of five cents per ton was paid. The court found, and there is evidence to support the finding, that the rock furnished from Acton was so furnished at the request of the defendant. In view of this fact, there is no doubt of the correctness of the amount of the judgment, if the defendant is liable at all for these commissions.

The plaintiffs have alleged and the court finds that plaintiffs as agents of the defendant contracted for the sale of said road material by a contract in writing, signed on behalf of the defendant by Ben C. Brock, its superintendent. It is contended on behalf of the defendant that this finding is wrong, because Brock had no authority to bind the defendant by the execution of such a contract. Section 2309 of the

Civil Code provides: "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." Under section 1624 subdivision 4 of the Civil Code, the following must be in writing: "An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accepts or receives part of such goods and chattels or the evidences, or some of them, of such things in action, or pays at the time some part of the purchase money." While no definite amount or total price is mentioned in the writing in question, the magnitude of the work as described and the rate per ton that was to be paid clearly establish that the contemplated price was many times two hundred dollars. The evidence shows that no written authority was ever given by the corporation to Brock or to the plaintiffs authorizing either of them to make sales. Such authority as they had with respect to sales of rock must be derived from the oral instructions given by Hogan to Brock and the oral agreement of agency resulting from conversations between Brock and the plaintiffs, and from the course of business established by the transactions connected with plaintiffs' agency on and after May 19, 1911, and the course of business of the defendant with respect to the transaction of business for it by Brock and Crawford.

It is next contended that the writing in question did not constitute a contract because it was not delivered to the defendant and because the fact that it had been signed by Deaderick was never brought to the knowledge of the defendant until after the above noted transactions of September 23rd. This point is of no importance, unless it be first held that Brock had authority to enter into such contract. If he did have such authority, then we think that the return of the writings by Deaderick to the possession of plaintiffs and the subsequent transactions to which Brock, as representing the defendant, was a party, were such that the writings must be considered as delivered to the defendant at least as soon as the time when the defendant began to deliver orders of material for the Montecito road, which, as we have seen, was prior to September 15th.

It is next contended by appellant that there was no sale, because Supervisor Deaderick had no authority to represent the county of Santa Barbara in purchasing such materials.

We will assume from the record, as shown by the testimony above noted, that the board of supervisors had acted regularly and in accordance with law in its proceedings with reference to the Montecito road down to and including the time when, on September 4th, it rejected bids and ordered that Supervisor Deaderick proceed and complete the work. (Pol. Code, sec. 2643, subd. 11; sec. 2645, subd. 1; sec. 4041, subd. 4.) The road work involved in this case was in a permanent road district, and for this reason the defendant contends that the board of supervisors had no authority except to let the work to the lowest responsible bidder, as provided by sections 2767, 2768 of the Political Code. But considering section 2767 with section 2643 to which it refers, it is reasonably indicated that the board may order such work done by the road commissioner when, after due publication and posting of notices inviting bids, the bids have been rejected for the reasons given in section 2643, subdivision 11.

The evidence in this case shows that Supervisor Deaderick and all other officers of the county of Santa Barbara concerned in the matter at all times considered said writing of September 1, 1911, as a valid contract. The district attorney and the supervisor insisted upon the contract. Changes were made from time to time in the rate of delivery of the rock; and for convenience in arranging for freight payments, the freight charges were paid by the county and seventy cents per ton paid to the defendant. Until the slight reduction in freight rates that was obtained by the county in December, seventy cents per ton plus the freight rate was exactly the same as the \$1.30 per ton provided in the contract. Without any objection whatever by Supervisor Deaderick to the terms of the contract, he received the materials and the county paid the consideration therefor. We find in the evidence no sufficient reason for declaring that the purchaser did not act pursuant to the contract, or that the contract was not fully performed. As already noted, it is a fact that at least until as late as September 15, 1911, plaintiffs were the agents of the defendant for the sale of rock in Santa Barbara County at an agreed commission of ten cents per ton; that a purchaser was found by them for rock to be delivered for use in building 5½ miles of Montecito road; that some deliveries of rock were made by the defendant after the writings had been signed by Brock with the knowledge of Crawford and before

plaintiffs had been dismissed from their agency; that Brock and Crawford were the active representatives of the corporation in the transaction of its business under direct authorization from the president and general manager of the corporation, who was also the real owner of the entire business; that on or about September 15th said owner caused the stock to be transferred to other parties who attempted to repudiate the contract as a contract without repudiating the substantial part of the transaction which was delivery of the rock and receiving the price therefor; that the principal advantage which the defendant and its new owners sought to obtain by such repudiation was that they might avoid the payment of this commission; that their representative, Mr. Heaton, had heard of a contract, but did not take the trouble to inquire for it and ascertain its exact terms; that thereupon the plaintiffs within a reasonable time gave notice that they would demand their commission, and at the proper time commenced this action to enforce such demand.

It is true that on September 13, 1911, in a letter to the defendant, the plaintiffs, referring to a statement made to them by Mr. Brock that "two car loads a day to begin would be all this company of men could handle," said, "so please fill the order for the county with 2 cars each day, and only 2 cars until further orders. . . . Please allow this written order to supersede all conversations and writings." But this was nothing more than a request referring to the rate of deliveries. In our opinion, it was not an attempt to cancel the alleged written contract. Such cancellation could not be made by a writing between the principal and agent on one side of a contract, and the subject matter of the letter is not such that it should be construed as superseding the entire contract, if such contract existed.

Under the circumstances above noted, this case should be determined upon the assumption that Superintendent Brock had authority to make the contract which he undertook to make on behalf of the defendant. The defendant accepted the benefits of that contract and performed it; also accepted the benefit of the services of the plaintiffs, who were its agents, with reference thereto. The statements and actions of Mr. Heaton on September 23rd and the defendant's claim that it was not delivering rock under the contract do not neutralize the fact that the defendant proceeded to deliver

the same quantities of rock, and for the same compensation, that had been provided for in that contract. Even if it were conceded that defendant might have refused to deliver the rock, and might have exacted different terms, basing its position upon Brock's lack of authority, yet it is estopped to deny such authority, as against these plaintiffs, who as actual and undenied agents relied upon Brock's due authorization and obtained for defendant the benefits which it has accepted. The same reasoning and the same conclusion apply to defendant's claim that Supervisor Deaderick had no authority to represent the county of Santa Barbara in purchasing rock for the Montecito road. The county recognized his authority by accepting and paying for the rock as delivered by the defendant, and that is sufficient for all purposes of the present case.

Some exceptions to the rulings on evidence are discussed in the briefs of appellant, but, so far as they have importance, they are involved in the foregoing discussion and are determined thereby.

The judgment and order are affirmed.

Shaw, J., and James, J., concurred.

[Crim. No. 339. Second Appellate District.—July 3, 1914.]

In the Matter of the Application of V. MASCOLO, for a Writ of Habeas Corpus.

FISH AND GAME LAW—DIVISION OF STATE INTO DISTRICTS—TITLE OF ACT.—The act of June 16, 1913 (Stats. 1913, p. 988), entitled "An act to amend an act entitled 'An act to divide the state of California into six fish and game districts,' approved March 21, 1911, by adding a new section thereto," is unconstitutional, for instead of merely adding a new section, the act purports not only to divide the state into seven fish and game districts, but in fact otherwise materially changes and amends every section of the original act of 1911 (Stats. 1911, p. 425).

ID.—VOID AMENDATORY STATUTE—EFFECT ON ORIGINAL ACT.—Such act being void, it is inoperative for any purpose and effects no change whatsoever in the original act of 1911, whereby Los Angeles County was designated as being in the sixth fish and game district.

ID.—SECTION 636½ OF PENAL CODE—UNIFORMITY OF OPERATION—SPECIAL OR LOCAL LAW.—Section 636½ of the Penal Code, enacted in 1913 pursuant to section 25½ of article IV of the constitution authorizing the legislature to create fish and game districts and enact such laws for the protection of fish and game therein as it may deem appropriate to the respective districts, which section provides that “every person who at any time shall cast, extend, set, draw, use, or continue or assist in casting, extending, setting, drawing, using, or continuing any paranzella, or trawl net for catching fish shell-fish, shrimp, or crabs in the waters of fish and game district six or in the waters of Monterey Bay, shall be guilty of a misdemeanor,” is not in contravention of section 11 of article I of the constitution requiring that “all laws of a general nature shall have a uniform operation”; nor of subdivision 2, section 25 of article IV, which prohibits the passage of local or special laws “for the punishment of crimes or misdemeanors.”

ID.—TITLE OF ACT MORE COMPREHENSIVE THAN ACT ITSELF.—Nor does such act contravene section 24 of article IV of the constitution, which provides that “every act shall embrace but one subject, which subject shall be expressed in its title.” While the title prohibits the use of lompara, paranzella, trawl or drag nets, the inhibition in the body of the act is directed to paranzella and trawl nets only; but the fact that the title is broader than the act itself does not render the act obnoxious to the section of the constitution in question.

ID.—STATUTE VOID IN PART—WHETHER INVALID IN TOTO.—Although a statute may be invalid or unconstitutional in part, the part that is valid will be sustained if it can be separated from that part which is void.

ID.—SPECIAL LAW FOR PUNISHMENT OF CRIME—SECTION 636½ OF PENAL CODE.—Such section 636½ of the Penal Code is not invalid because of subdivision 2, section 25 of article IV of the constitution prohibiting the legislature from passing local or special laws for the punishment of crimes and misdemeanors, since that provision of the constitution is qualified and limited by section 25½ of article IV, subsequently adopted.

ID.—INTERPRETATION OF CONSTITUTION—REPUGNANT PROVISIONS.—A construction which raises a conflict between parts of a constitution is inadmissible, when by any reasonable interpretation they may be made to harmonize, and in case of irreconcilable repugnancy the provision last in order of time should prevail.

APPLICATION for a Writ of Habeas Corpus.

The facts are stated in the opinion of the court.

C. W. Pendleton, for Petitioner.

J. D. Fredericks, District Attorney, and John L. Richardson,
Deputy District Attorney, for Respondent.

SHAW, J.—Petitioner was arrested and held upon a warrant charging him with a violation of the provisions of section 636½ of the Penal Code.

Section 25½ of article IV of the constitution, which was adopted in 1902, provides: "The legislature may provide for the division of the state into fish and game districts, and may enact such laws for the protection of fish and game therein as it may deem appropriate to the respective districts." Pursuant to this provision the legislature adopted an act, approved March 21, 1911 (Stats. 1911, p. 425), entitled: "An act to divide the state of California into six fish and game districts." In 1913 this act was amended by an act approved June 16, 1913, entitled: "An act to amend an act entitled 'An act to divide the state of California into six fish and game districts,' approved March 21, 1911, by adding a new section thereto." (Stats. 1913, p. 988.)

Petitioner attacks this act claiming that it is unconstitutional and void. According to the title, the only change proposed in the amendment was the addition of a new section to the act of 1911, otherwise leaving it as originally enacted. Instead of merely adding a new section, the bill purports not only to divide the state into seven fish and game districts, but in fact otherwise materially changes and amends every section of the act of 1911. There was nothing in the title to indicate any such intent or purpose. The act itself is confusing in that the proposed new section is to be numbered seven, while the act which it was proposed to amend contains a section so numbered. The subject of the amendment was not expressed in the title, which, in view of the attempted legislation, was well calculated to mislead and deceive both the public and the members of the legislature. We, therefore, hold the act of 1913 to be void. (*Ex parte Liddell*, 93 Cal. 633, [29 Pac. 251]; *Wood v. Commissioners*, 58 Cal. 561.) Being void, it was inoperative for any purpose and effected no change whatsoever in the act of 1911 (*Lewis v. Dunne*, 134 Cal. 291, [86 Am. St. Rep. 257, 55 L. R. A. 833, 66 Pac. 478]), whereby

Los Angeles County was designated as being in the sixth fish and game district.

The legislature having by the act of 1911 divided the state into six districts, proceeded as authorized by section 25½ of article IV of the constitution to adopt a law deemed appropriate for the protection of fish and game in the counties comprising the sixth district. This act, entitled: "An act to add a new section to the Penal Code of the state of California, to be numbered six hundred and thirty-six and one-half, to prevent the use or possession of lompara nets, paranzella nets, trawl or drag nets, and providing the penalty therefor," (Stats. 1913, p. 979) provides that "Every person who at any time shall cast, extend, set, draw, use, or continue or assist in casting, extending, setting, drawing, using, or continuing, any paranzella or trawl net, for catching fish, shellfish, shrimp, or crabs in the waters of fish and game district six or in the waters of Monterey Bay shall be guilty of a misdemeanor, and upon conviction shall be punishable by a fine of not less than two hundred and fifty dollars, or by imprisonment in the county jail in the county in which the conviction shall be had, not less than one hundred and twenty-five days, or by both such fine and imprisonment."

Petitioner insists that section 636½ of the Penal Code, under which he is charged with the offense, is unconstitutional for the reasons: 1. That it is special and class legislation; 2. That it is not uniform in its operation; and 3. That it is in contravention of certain provisions of the constitution, to wit: (a) section 11 of article I, requiring that "all laws of a general nature shall have a uniform operation"; (b) section 24 of article IV, which provides that "every act shall embrace but one subject, which subject shall be expressed in its title"; and (c) subdivision 2, section 25 of article IV, which prohibits the passage of local or special laws "for the punishment of crimes or misdemeanors." These objections to the validity of section 636½ are largely answered by the constitutional provision which in express terms authorizes the legislature to create fish and game districts and "enact such laws for the protection of fish and game therein as it may deem appropriate to the respective districts." The law as passed, in so far as it affects petitioner, applies with uniformity to all persons within the sixth district, and while local in that it applies to such district alone, it is not special, since

it applies to the entire district. The validity of the act, in so far as it purports to legislate for that part of the fifth district consisting of Monterey Bay, is not here involved. Even were it conceded to be special legislation as to the fifth district, such fact does not affect the validity of that part of the act applicable to the sixth district. The rule is that, although a statute may be invalid or unconstitutional in part, the part that is valid will be sustained where it can be separated from that part which is void. It is not obnoxious to section 11 of article I, since, as stated, it does not purport to be a general law applicable to the entire state. Section 24 of article IV is directed against the omission to express the subject of the legislation in the title, not to the fact that the title is broader than the subject of the act. "A law might be invalid for want of compliance with this section, if it contained matter not expressed in the title, but it would not be where the title contains more than is necessary to point out the object of the law." (*Davis & Bro. v. Woolnough*, 9 Iowa, 104.) While the title prohibits the use of lompara, paranzella, trawl or drag nets, the inhibition in the body of the act is directed to paranzella and trawl nets only. The fact that the title is broader than the act itself does not render the act obnoxious to the section of the constitution here invoked. (*Boyer v. Grand Rapids Fire Ins. Co.*, 124 Mich. 455, [83 Am. St. Rep. 338, [83 N. W. 124].)

Petitioner insists that by subdivision 2, section 25 of article IV, the legislature is prohibited from passing local or special laws "for the punishment of crimes or misdemeanors." This provision is general, and in point of time precedes the adoption of section 25½ of article IV, which is special. A construction which raises a conflict between parts of the constitution is inadmissible when by any reasonable interpretation they may be made to harmonize, and in case of irreconcilable repugnancy the provision last in order of time should prevail. Says Judge Cooley in his work on Constitutional Limitations (p. 92): "One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together." It is clear that in adopting the later provision the intention was to qualify and limit the effect of subdivision 2 of section

25, thus giving the legislature, as therein stated, the power to enact penal laws, and provide for the enforcement thereof, appropriate to the several fish and game districts throughout the state. Even if the provisions should be deemed repugnant, then the one first in point of time must yield to the later. If in one section a power is specifically conferred or a duty specially enjoined, which in general terms is prohibited by other sections, the power or duty specially conferred or enjoined constitutes an exception to the general rule. The direction to employ the power or discharge the duty in the particular instance is as mandatory as the general prohibition. (*San Francisco etc. R. R. Co. v. State Board*, 60 Cal. 12.)

Petitioner's objections to the validity of the act under which the warrant for his arrest was issued are highly technical and, in our opinion, without merit. It is, therefore, ordered that the petition be dismissed and petitioner remanded to the custody of the sheriff.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1581. Second Appellate District.—July 8, 1914.]

FREDERICK LUMMER, Sr., Appellant, v. H. A. UNRUH,
as Executor of the Will of Elias J. Baldwin, Deceased
et al., Respondents.

QUIETING TITLE—ENTRY UPON LAND SUPPOSED TO BE UNAPPROPRIATED—SUBSEQUENT RECOGNITION OF OWNER.—In this action to quiet title the evidence is sufficient to establish that the plaintiff, though he may have entered upon the property in question believing it to be no man's land, subsequently recognized that the defendant's testate was the owner thereof and thereafter occupied the premises in subordination to the rights of the testate, paying him a part of the annual crop as rental, and thereby creating the relation of landlord and tenant.

ID.—RELATION OF LANDLORD AND TENANT—HOW CREATED—PRESUMPTION.—A formal letting is not necessary to create the relation of landlord and tenant. After a person has entered upon land without right, the relation may arise by implication. A presumption in favor of the existence of the relation arises where a person in the possession of land pays rent to one claiming as owner.

ID.—ASSESSMENT OF LAND FOR TAXATION—SUFFICIENCY OF DESCRIPTION—EVIDENCE.—If in such case an assessment of the property for purposes of taxation so designated the land that it would afford the owner a means of identification, and would not positively mislead him or would not be calculated to do so, the description is sufficient so that the return of the land for assessment and the payment of taxes thereon by the testate is admissible in evidence.

ID.—DEED—EXCEPTION IN GRANTING CLAUSE—EVIDENCE.—Where a party claims under a deed describing a tract of land, the granting clause of which contains an exception, he must, if he relies upon the deed as establishing his title to land in controversy, show that the land claimed is not within the exception; otherwise the deed is ineffectual for the purposes offered. From the fact that certain lands within the exterior boundaries of the general clause contained in the deed were excepted from the operation thereof, it cannot be said, in the absence of proof, that the land in dispute is not within the exception.

ID.—EXCEPTION IN DEED—FORCE AND EFFECT.—An exception in a grant is said to withdraw from its operation some part or parcel of the thing granted, which, but for the exception, would have passed to the grantee under the general description. The effect in such cases in respect to the thing excepted is as though it had never been included in the deed.

ID.—PRESUMPTION OF GRANT WITHIN PERIOD SHORT OF STATUTE OF LIMITATIONS.—There is no absolute bar against the presumption of a grant, within a period short of the statute of limitations.

ID.—POSSESSION OF LAND—PRESUMPTION OF LAWFUL ORIGIN—EXCEPTIONS IN DEED.—Upon the principle that when the possession and use of real property under a claim of right thereto have been long continued they create a presumption of lawful origin the court is justified, in this case, in indulging the presumption that the tract of land in dispute was not within the exceptions specified in the deeds, and, notwithstanding the failure of the defendants to make direct proof as to the land being without the exception, such fact, in the absence of any evidence to the contrary, will be presumed.

ID.—APPEAL—WEIGHT AND CREDIBILITY OF EVIDENCE—CONCLUSIVENESS OF CONCLUSION OF TRIAL COURT.—Where the evidence is substantially conflicting, it is not the province of this court to weigh the same, or determine whether or not witnesses have sworn falsely. If there is any evidence upon which the court could have made the findings, or a jury could have found a verdict, the action of the trial court must be upheld.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial.
C. A. Raker, Judge presiding.

The facts are stated in the opinion of the court.

Sidney Dell, and Scarborough & Bowen, for Appellant.

Bradner W. Lee, Force Parker, Gavin McNab, Garret W. McEnerney, and Andrew F. Burke, for Respondents.

SHAW, J.—Action to quiet title to real estate. Judgment went for defendants, from which, and an order denying his motion for a new trial, plaintiff prosecutes this appeal.

Defendant Unruh was sued as executor of the last will and testament of Elias J. Baldwin, deceased, who died March 1, 1909, and defendants Stocker and McClaughry were sued as the residuary legatees under the will of said deceased, all of whom, with the other defendants named, it is alleged, claim some interest, right, or title to the property in dispute.

The land involved, comprising 80.35 acres, is situated in and constitutes a part of the west two-thirds of the San Francisco Rancho in Los Angeles County. Plaintiff's claim thereto is based solely and alone upon the adverse possession thereof, it being alleged in the complaint filed September 12, 1910, that on or about the twenty-fifth day of November, 1887, at which time the said tract was wild and uncultivated, covered with cactus and other desert growth, he entered into possession thereof, claiming it as his own property, since which time he has been in the open, notorious, exclusive, continuous, peaceable, and adverse possession of the same, claiming title thereto, which, up to the first day of January, 1909, at which time he was in possession, had not been disputed; that by virtue of the premises plaintiff became and was the owner of the legal title to the same on and prior to the first day of January, 1896, and ever since said date has been and now is the owner of said land. The answer of defendants Unruh, Stocker, and McClaughry alleged that at the time of his death, and for many years prior thereto, Elias J. Baldwin was the owner in fee simple of all the lands and property described in plaintiff's complaint and claimed title thereto adversely to plaintiff, and that at the time of the death of said decedent defendants Stocker and McClaughry, as residuary devisees of said decedent became entitled to said property and the whole thereof in fee simple, subject to the administration of the estate of said Baldwin, deceased; and

that plaintiff during all of the time that he occupied said land did so as a tenant of said Baldwin and said Unruh as executor, from whom said plaintiff leased the same from year to year and up to the year ending October 1, 1909, paid a crop rental therefor.

Among other things, the court in substance found that at the time of the commencement of the action, and on January 1, 1909, plaintiff as a tenant, and not otherwise, of said Elias J. Baldwin and the estate of said Elias J. Baldwin, deceased, occupied the tract of land in controversy, but never was in the possession thereof, except as a tenant of said Elias J. Baldwin during his lifetime, and of his estate since his death; that on October 13, 1875, and up to and at the time of his death, said Elias J. Baldwin was the absolute owner, seized in fee simple, in the possession and entitled to the possession of said real property, and from said date up to November 25, 1887, in the actual occupation of said premises; that while in the occupation and possession thereof, plaintiff, on November 25, 1887, with Baldwin's permission and consent, and as the tenant of said Baldwin, and not otherwise, entered into the occupation of said property as a yearly tenant of said Baldwin, which occupation and relation continued up to the time of his death, and thereafter as a tenant of the estate of said Baldwin, deceased; that during said time plaintiff paid yearly rents to said Baldwin for the use and occupation of said real property, except for the year ending October 1, 1909, when he refused to pay rent for that year and for the first time asserted an adverse claim of ownership to said real property; that at no time was plaintiff in possession of the real estate, or any part thereof, other than as a tenant of Elias J. Baldwin; that it is not true that said tract of land was uncultivated at the time the plaintiff entered into the occupation thereof, but small portions of said land were at said time covered with cactus and other growth. These findings are vigorously assailed upon the ground that the evidence is insufficient to support the same.

The evidence offered in behalf of respondents and upon which the findings are based clearly tends to prove that in 1867 one Henry Dalton, by United States patent, acquired the entire Rancho San Francisquito; that on March 8, 1873, Dalton by deed conveyed to Lewis Wolfskill "all the unsold portion of that certain tract of land known as San Francis-

quito Rancho"; that on October 13, 1875, Wolfskill by deed conveyed to Elias J. Baldwin "the westerly two-thirds portion of the Rancho Francisquito, . . . excepting those portions heretofore sold and conveyed by John O. Wheeler and Henry Dalton, or Dalton and F. L. A. Pioche, or Lewis Wolfskill, the conveyances of which are of record in the county recorder's office in and for said county of Los Angeles." The parcel of land involved is an irregular-shaped tract containing 80.35 acres, uninclosed by a fence and conceded to be a part of the westerly two-thirds portion of the San Francisquito Rancho; and it is likewise conceded that from 1875 down to the date of his death Baldwin made return thereof and paid the taxes assessed against the property, though appellant claims the assessment upon which the tax levy was made was void for uncertainty of description. Prior to plaintiff's entry upon the land, November 25, 1887, it was occupied by some Mexicans, who farmed it as tenants of Baldwin. There is no direct evidence that plaintiff's entry in 1887 was under and by virtue of any contractual relations with Baldwin, or his agents, but it does clearly appear from a preponderance of the evidence that, commencing with the year 1887, down to 1908, and every year during said period, plaintiff as to the land in dispute recognized Baldwin as his landlord by annually paying him, through several superintendents and rent collectors, a certain portion of the crop grown thereon, as rental for the use of the property; that at times he sublet portions of it and these subtenants paid to Baldwin a rental for such portion as they farmed. There was also testimony to the effect that plaintiff had stated he was paying rent to Baldwin for the use of the property, and plaintiff admits that Baldwin contributed a considerable sum toward the construction of a well in developing water upon the premises. Evidence was introduced that in 1908 plaintiff failed to pay the rent; whereupon Baldwin served notice upon him to quit and vacate the premises, pursuant to which plaintiff moved a part at least of his effects from the property, when, due to the intercession of a friend, Baldwin consented that plaintiff might continue as tenant in the occupation of twenty acres of the land, and leased the remainder of the tract to other parties made defendants herein. As against this testimony, and other established facts to which we have made no reference, but from which inferences favorable to respondents'

contention are fairly deducible, plaintiff, to some extent corroborated by his wife, testified that he never at any time paid rent to Baldwin, or any other person, for the use of the land in dispute; that in 1890 or 1891 he did lease from Baldwin sixty acres of land adjoining the tract claimed by him, separated by an imaginary line only, which, up to 1908, he farmed and for the use of which he paid Baldwin a yearly crop rental. Appellant, while admitting the fact that plaintiff's testimony upon the vital point, as found by the court, is opposed to that of a half dozen or more witnesses testifying on behalf of defendants, strenuously insists that such testimony should for various and sundry reasons assigned be disregarded by this court. His counsel devote much of the greater part of a voluminous brief to what he terms an analysis of the testimony, in his effort to show why certain witnesses who gave evidence for plaintiff should be credited with telling the truth, while those testifying for defendants should be discredited. No purpose should be subserved by an extended review of the evidence. Suffice it to say that from a careful reading of the entire record we are forced to the conclusion that, while plaintiff may have entered upon the land or a part thereof believing, as he stated, that it was no man's land, he nevertheless, upon learning of his error, commencing with 1887, recognized Baldwin as the owner thereof and that his occupation was in subordination to the rights of Baldwin, and during all of the time down to 1908, at which time Baldwin caused to be served upon him notice to quit and vacate the premises, he annually paid to Baldwin a yearly crop rental for the use of the premises. Where the evidence is substantially conflicting, it is not the province of this court to weigh the same, or determine whether or not witnesses have sworn falsely. If there is any evidence upon which the court could have made the findings, or a jury could have found a verdict, the action of the trial court must be upheld. (*Meyer v. Great Western Ins. Co.*, 104 Cal. 387, [38 Pac. 82]; *Clopton v. Clopton*, 162 Cal. 27, [121 Pac. 720]; *Carteri v. Roberts*, 140 Cal. 164, [73 Pac. 813].)

As stated there was no direct evidence that plaintiff entered upon the land pursuant to the terms of a lease, and it may be conceded that, as testified by him, he squatted thereon, believing it to be government land. A formal letting, however, is not necessary to create the relation of landlord and

tenant. "After a person has entered upon land without right, the relation of landlord and tenant, of course, subsequently arises by implication." (18 Am. & Eng. Ency. of Law, p. 165.) "Where a person in the possession of land pays rent to one claiming as owner, a presumption of the relation of landlord and tenant arises." (24 Cyc., p. 888; *Doe v. Jefferson*, 5 Houst. (Del.) 477; *Cressler v. Williams*, 80 Ind. 367.) Under the evidence adduced the payment of rent, as found by the court, could not be attributed other than to the fact that plaintiff's occupation was in subordination to the title recognized by him as vested in Baldwin, whose title, under the circumstances, he will not be permitted to deny. (Code Civ. Proc., sec. 1962.) The case is to be distinguished from one where the owner in possession of land accepts a lease thereof from another, in which case his title is unaffected by such act. (*Baldwin v. Temple*, 101 Cal. 396, [35 Pac. 1008].)

It is conceded that plaintiff never at any time made return of the property for assessment purposes, or paid any taxes thereon. On the other hand, it is conceded that Baldwin paid the taxes, but appellant insists that the assessment of the property was void for uncertainty of description therein. It appears that in 1869 John Goldsworthy made a survey and map of the westerly two-thirds of the rancho, subdividing it into lots designated thereon by number. While Baldwin had no interest in the property at the time this map was made, it appears that after the execution of the Wolfskill deed in 1875, whereby he claims to have acquired the property therein described, he, on August 3, 1901, filed and had recorded in the county recorder's office a full, true, and correct copy of the Goldsworthy survey and map, on which, among other lots delineated thereon, was a lot numbered 14 containing 80.35 acres, which is shown to be identical with the tract of land claimed by plaintiff. In 1891 to 1896, both inclusive, the assessment described the property as "lot 14 in San Francisquito Rancho, containing 80.35 acres." For the years 1897 to and including 1910, it was, with some slight variation, described as "lot 14, western 2/3 of Rancho San Francisquito, containing 80.35 acres." Prior to the filing of the map, and commencing with 1880, it was described as "lot 14 of Tract Rancho San Francisquito, county of Los Angeles, being subdivided and designated on map made by John Golds-

worthy in January, 1869." It was shown without contradiction that this was the only map on file purporting to be a map of the rancho, and that it had delineated thereon a lot designated as lot 14. It was further conclusively shown that long prior to the filing thereof the Goldsworthy map was a well-known and generally recognized subdivision of the west two-thirds of the rancho, frequently referred to in deeds made by conveyancers as a means of describing lands located in the rancho. Other testimony was to the effect that as described the boundaries of the land could be readily located. Says Mr. Cooley in his work on Taxation: "The designation of the land will be sufficient if it affords the owner a means of identification and does not positively mislead him, or is not calculated to mislead him." To the same effect are the decisions of the supreme court of this state. (See: *Best v. Wohlford*, 144 Cal. 736, [78 Pac. 293]; *San Francisco v. Pennie*, 93 Cal. 465, [29 Pac. 66]; *San Francisco v. Flood*, 64 Cal. 504, [2 Pac. 264].) Leaving out of consideration any question as to whether or not Baldwin, by reason of having made the return, could have been estopped from pleading uncertainty in the description of the assessment in an action to enforce a lien for the taxes, we are clearly of the opinion that the assessment sufficiently described the property, and the objection urged by plaintiff to the admission of the evidence is therefore without merit.

Appellant also insists that the court committed grave and prejudicial errors of law in admitting certain documents in evidence. These documents consisted of, first, a deed from Henry Dalton, who in 1867 by patent acquired the entire rancho from the United States government, which deed was executed March 8, 1873, by Dalton to Lewis Wolfskill, whereby the former conveyed to the latter "all the unsold portion of that certain tract of land known as the San Francisquito Rancho"; second, a deed dated October 13, 1875, executed by Lewis Wolfskill and others whereby they conveyed to Elias J. Baldwin the "westerly two-thirds portion of the Rancho San Francisquito, . . . excepting those portions heretofore sold and conveyed by John O. Wheeler and Henry Dalton, or Dalton and F. L. A. Pioche, or Lewis Wolfskill, the conveyances of which are of record in the county recorder's office in and for said county of Los Angeles." The purpose of this evidence was to show that

title of record to the land in question was vested in Baldwin. Appellant's contention is that, in the absence of evidence showing such fact, the deeds cannot be construed as embracing the land in controversy, and while conceding that that is certain which can be made certain (Civ. Code, sec. 3538), no evidence was offered touching the question as to whether or not the lands in dispute had at the time of the execution of the Dalton deed been sold, nor whether they were included in the conveyance referred to in the Wolfskill deed. Since by introducing these deeds defendants sought to establish the fact that Baldwin was the record owner of the property, they must be deemed to have assumed the burden of showing that the tract of land was not within the exceptions therein contained. The deeds did not purport to convey the entire tract of land the boundaries of which were specified therein, but excepted from the operation thereof such portions as had been sold and conveyed. True it may be that no sales had been made at the time of the execution of the Dalton deed, and likewise true that no conveyance of any of the lands had been made by the parties designated which were of record at the time of the execution of the Wolfskill deed; nevertheless, by reason of the language employed, a presumption arises that sales and conveyances had been made, and it was therefore incumbent upon defendants to either overcome such presumption by showing that no sales and conveyances had been made of lands within the exterior boundaries described, or, if sales and conveyances thereof had been made to prove that the tract of land in controversy was not included therein. No evidence, however, was offered touching these questions. We conceive the law to be that where a party claims under a deed describing a tract of land, the granting clause of which contains an exception, he must, if he relies upon such deed as establishing his title to land in controversy, show that the land claimed is not within the exception; otherwise the deed is ineffectual for the purposes offered. From the fact that certain lands, within the exterior boundaries of the general clause contained in the deed were excepted from the operation thereof, it cannot be said, in the absence of proof, that the land in dispute is not within the exception. That such is the well settled law, is supported by ample authority. (See: *Harman v. Stearns*, 95 Va. 58, [27 S. E. 601]; *Logan v. Ward*, 58 W. Va. 366, [5 L. R. A.

(N. S.) 156, 52 S. E. 398]; *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, [38 L. Ed. 279, 14 Sup. Ct. Rep. 458]; *Hawkins v. Barney*, 5 Pet. 457, [8 L. Ed. 190]; *Reusens v. Lawson*, 91 Va. 226, [21 S. E. 347]; *Corinne Mill, Canal & S. Co. v. Johnson*, 156 U. S. 574, [39 L. Ed. 537, 15 Sup. Ct. Rep. 409].) In the case of *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, [38 L. Ed. 279, 14 Sup. Ct. Rep. 458], it is said "An exception in a grant is said to withdraw from its operation some part or parcel of the thing granted, which, but for the exception, would have passed to the grantee under the general description. The effect in such cases in respect to the thing excepted is as though it had never been included in the deed." The deeds in themselves and standing alone were insufficient to show a record title vested in Baldwin.

If, however, we are correct in holding that during the period extending from 1887 down to 1908 Baldwin, claiming to be the owner, was in possession of the land through plaintiff as his tenant, paying all taxes levied thereon, then it may be assumed that he acquired a title by prescription. Hence, the fact that the deeds on their face were insufficient to constitute a paper title would be immaterial, since in no event could plaintiff have been prejudiced by defendants' failure to prove a record title. Moreover, as stated, the evidence clearly tends to establish the fact that, until plaintiff in 1909 asserted his adverse claim thereto, Baldwin had for a period of thirty-three years been in the undisturbed possession of the land, exercising all the rights of ownership therein without challenge or question from any sources, during all of which time he had, as stated, paid all taxes levied thereon. Under these circumstances, if necessary to sustain the judgment, the law will presume the land was not within the exceptions made in the deeds. The failure of any person during this long period of time to make claim of ownership based upon a sale made by Dalton prior to his conveyance to Wolfskill, and like failure of any one claiming under a conveyance executed by Wolfskill prior to his conveyance to Baldwin, was a strong circumstance indicating that no such sales or conveyances had been made of the tract here involved. (*Herndon v. Burnett*, 21 Tex. Civ. App. 25, [50 S. W. 581]; *Cahill v. Cahill*, 75 Conn. 522, [60 L. R. A. 706, 54 Atl. 201, 732].) While it is unusual to invoke such presumption,

since the statute of limitations generally constitutes a sufficient defense, nevertheless, if the circumstances of the case justify it, such presumption will be indulged regardless of whether or not the statute has run. "There is no absolute bar against the presumption of a grant, within a period short of the statute of limitations." (*Ricard v. Williams*, 20 U. S., (7 Wheat.) 59, [5 L. Ed. 398].) Therefore, upon the principle that when the possession and use of real property under a claim of right thereto have been long continued they create a presumption of lawful origin (*Fletcher v. Fuller*, 120 U. S. 534, [30 L. Ed. 759, 7 Sup. Ct. Rep. 667]; *Attorney-General v. Horner*, 2 Ch. Div. (C. A.) 140), the court is justified in indulging the presumption that the tract of land in dispute was not within exceptions specified in the deeds, and, notwithstanding the failure of defendants to make direct proof as to the land being without the exception, such fact, in the absence of any evidence to the contrary, will be presumed.

In discussing the case we have throughout the opinion assumed that the tract of land in controversy consisted of said lot 14, comprising 80.35 acres. It appears that at the close of the evidence plaintiff amended his complaint by adding to the description of land therein contained as claimed by him, another tract the boundaries of which were conceded to be identical with lot 13 delineated upon the Goldsworthy map, and it was stipulated that all of the evidence applicable to the case as alleged in the original complaint should be deemed to apply to the case as amended. Hence, whatever is said with reference to lot 14, comprising 80.35 acres, is likewise applicable to the land as described in the amended complaint.

We find no prejudicial error in the record. The judgment and order denying plaintiff's motion for a new trial are, therefore, affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1388. First Appellate District.—July 6, 1914.]

THOMAS BAUCOM, Appellant, v. HESTER BELLE BAUCOM, Respondent.

DIVORCE—SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS IN FAVOR OF DEFENDANT.—In this action for a divorce the testimony of the defendant alone, if believed by the court, was sufficient to support the finding that she had not been guilty of the extreme cruelty charged against her. On the other hand, her testimony, with the corroborating testimony of other witnesses, was, if believed by the trial court, sufficient to support the finding that the plaintiff had been guilty of extreme cruelty toward her. The latter finding alone is in turn sufficient to sustain the judgment in favor of the defendant upon her cross-complaint.

ID.—CONFLICTING TESTIMONY—REVIEW ON APPEAL.—The decision of the trial court in such case, resting upon conflicting evidence, will not be disturbed on appeal.

ID.—EVIDENCE—WEIGHT AND CREDIBILITY—NUMBER OF WITNESSES.—The rule that when the evidence in a civil case is contradictory, the decision must be made according to the preponderance of evidence, contemplates that the court will be controlled by the weight of the evidence, as indicated by the apparent credibility of the witnesses, rather than by their mere numerical preponderance. Witnesses are not counted, but their testimony is weighed.

APPEAL from a judgment of the Superior Court of Santa Cruz County and from an order refusing a new trial. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

James A. Hall, for Appellant.

Wyckoff & Gardner, for Respondent.

LENNON, P. J.—In this case the plaintiff prayed for a divorce from the defendant upon the single ground of extreme cruelty. The defendant denied in her answer the acts of cruelty charged against her in the plaintiff's complaint, and in addition, interposed a cross-complaint, alleging habitual intemperance and extreme cruelty on the part of the plaintiff, and prayed that a divorce be granted to her upon those grounds. All of the material allegations of the de-

defendant's cross-complaint were denied in an answer thereto by the plaintiff. Upon the issues thus raised the court below found against the plaintiff upon the allegations of his complaint, and found for the defendant in substantial accord with the allegations of her cross-complaint. Judgment was accordingly entered, granting the defendant an interlocutory decree of divorce, from which, and from an order denying a new trial, plaintiff has appealed.

In support of the appeal plaintiff relies solely upon the contention that the findings of fact made against him upon the issues raised by his complaint and the defendant's answer, are contrary to the evidence; and that the findings of fact made in favor of the defendant upon the issues raised by her cross-complaint and the plaintiff's answer thereto, are not supported by the evidence. This contention is rested solely upon the reasoning that because the testimony of the defendant relative to the paramount issues in the case was in one instance contradicted by two witnesses for the plaintiff, and in another instance by the plaintiff and three witnesses, "her testimony is to be disregarded, and there remains no substantial conflict in the evidence."

Perchance this contention is seriously made; but if so, it need not be seriously considered, further than to say that the settled and generally understood rule of evidence (Code Civ. Proc., sec. 2061, subd. 5), which directs that when the evidence in a civil case is contradictory the decision must be made according to the preponderance of evidence, contemplates that the court will be controlled by the weight of the evidence, as indicated by the apparent credibility of the witnesses, rather than by their mere numerical preponderance. In brief, it is axiomatic "that witnesses are not counted, but that their testimony is weighed." (Jones on Evidence, sec. 900.) Inasmuch as the very statement of the point presented for a reversal involves an admission of a conflict in the evidence adduced upon the whole case, it will suffice to say that the testimony of the defendant alone, if believed by the court, was sufficient to support the finding that she had not been guilty of the extreme cruelty charged against her. On the other hand, her testimony and the corroborating testimony of other witnesses was, if believed by the trial court, sufficient to support the finding that the plaintiff had been guilty of extreme cruelty toward her. The latter finding alone is

in turn sufficient to sustain the judgment in favor of the defendant upon her cross-complaint. The trial court apparently gave full credence to the testimony on behalf of the defendant, and accordingly resolved whatever conflict there may have been in the evidence upon the whole case in favor of the defendant. This the trial court had the right to do; and its decision upon the facts of the case, resting as it does upon conflicting evidence, will not be disturbed here.

The judgment and order appealed from are affirmed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 1333. First Appellate District.—July 7, 1914.]

SYDNEY E. MACKEY et al., Appellants, v. FRANK K. MOTT et al., Respondents.

MUNICIPAL CORPORATIONS—PENSIONED POLICE OFFICER—RIGHT OF SURVIVING ADULT CHILDREN TO BENEFITS.—Under subdivision 2 of section 96 of the charter of the city of Oakland, providing that upon the death of a service-pensioned police officer from “causes other than those specified in subdivision 1 of the section after ten years of service, then his widow, and if there be none, then his children, and if there be no widow or children, then his mother, if dependent upon him for support, shall be entitled to the sum of one thousand dollars,” the adult children of such a decedent are not entitled to receive the amount named out of the police relief and pension fund. They are not “children” within the meaning of the charter provision.

ID.—PURPOSE OF POLICE PENSION ACT—PERSONS ENTITLED TO ITS BENEFITS.—The term “children,” as contained in such charter provision was not intended to be used in the larger sense of sons and daughters. It was not contemplated by the framers of the charter that provision should be made for grown sons and daughters; the purpose of the whole act was to provide for aged and infirm officers and certain necessitous relatives and minor children.

ID.—CHILDREN—MEANING OF TERM—WHETHER INCLUDES ADULTS.—The meaning of the word “children” in its primary significance is generally understood to have reference to minor sons and daughters of a person, and in cases where the word has received a larger and more extended construction, it has been based upon the intention of the law-making power to so extend it. In such cases the construction of the term depends upon the context and surrounding

circumstances. The word when used as expressive of relationship includes sons and daughters of whatever age, but when used in reference to age is confined to minors.

ID.—INTERPRETATION OF STATUTES—PURPOSE OF LEGISLATION.—To arrive at the legislative intent in the interpretation of statutes, the original purpose and object of the legislation must be considered.

APPEAL from an order of the Superior Court of Alameda County sustaining a demurrer to the plaintiffs' amended complaint. W. S. Wells, Judge.

The facts are stated in the opinion of the court.

W. S. Angwin, for Appellants.

Ben F. Woolner, City Attorney, and William H. O'Brien, Deputy City Attorney, for Respondents.

KERRIGAN, J.—This action was brought to obtain a writ of mandate directed against the defendants, constituting the board of directors of the police relief and pension fund of the city of Oakland, requiring defendants to issue to plaintiffs a warrant for the sum of one thousand dollars against the police relief and pension fund of said city. A demurrer to the original complaint was sustained, and upon the filing of an amended complaint a demurrer was again interposed, and sustained by the court. Plaintiffs declined to further amend, and judgment was accordingly rendered in favor of defendants. This appeal is taken from the order of the court sustaining defendants' demurrer to plaintiffs' amended complaint.

The recitals in the amended complaint disclose the following facts:

John S. Mackey was appointed a regular police officer of the city of Oakland on the twentieth day of August, 1883, and was retired and pensioned on October 3, 1903, in accordance with the provisions of section 3 of the act creating a police relief, health, life insurance, and pension fund in the several counties of the state, approved March 4, 1889, and amended 1891 (Stats. 1891, p. 287) and further amended on March 2, 1897 (Stats. 1897, p. 52).

This act, so far as the city of Oakland is concerned, was thereafter superseded by provisions governing the retirement

and pensioning of police officers, contained in a charter adopted by the city of Oakland, and which became the organic law of said city on July 1, 1911. The general provisions of the Police Pension Fund Act of 1889, as enacted into the city charter of Oakland, are found in sections 93, 94, 95, and 96 of that instrument (Stats. 1911, p. 1608).

From the date of his retirement as aforesaid, John S. Mackey drew a pension from said fund until the date of his death, which occurred on the twenty-fifth day of December, 1911, at which time, under the terms of the charter, the pension ceased. At the time of his death he left surviving him as members of his family, two children, plaintiffs herein, both of whom are over the age of majority; and as he left no surviving widow, plaintiffs claim that in accordance with the provisions of section 96 of the charter of the city of Oakland, by reason of the death of their father, they are, as surviving children of said deceased and as members of his family, entitled to receive the sum of one thousand dollars out of the police relief and pension fund of the city of Oakland. The respondents resist this claim; and in support of their contention that the decision of the lower court should be sustained urge: 1. That under the charter of the city of Oakland the family of service-pensioned police officers are not entitled to participate in the police pension fund after the death of such officers; 2. That, even conceding this right to them, the appellants are not children of the deceased police officer within the meaning of subdivision 2, section 96 of the charter of Oakland; and, 3. That a proper construction of subdivision 2 of section 96 of said charter limits its provisions to children under sixteen years of age.

The charter provisions governing the retirement and pensioning of police officers are found in sections 94 and 95 of that act.

Section 94 provides for the retirement of any aged or infirm or disabled member who has arrived at the age of sixty years upon a pension of half his salary, provided he has been an active member of the department for twenty years preceding his retirement, such pension to cease upon his death.

Section 95 provides a similar pension to any member of the department disabled by any bodily injury received in the performance of his duty, the said pension to cease at his death.

Subdivision 1 of section 96 makes provision for the relatives of deceased officers who may be killed in the performance of their duty, and provides as follows:

Paragraph A declares that, should the deceased officer be married, his widow shall, so long as she remains unmarried, be paid a monthly pension equal to one-half of the salary attached to his rank at the time of his death.

Paragraph B under said subdivision provides that, under certain contingencies, "the orphan child or children under the age of 16 years" shall receive a pension, and concludes with the words, "provided that no child shall receive any such pension after attaining the age of 16 years."

Paragraph C of this same subdivision makes provision for pensioning the parent or parents of said officer if they are dependent upon him solely for support, in the event that such pensioner leaves no orphan child or children.

The above paragraphs of subdivision 1 of section 96 it will be noticed, refer to the relief granted in cases where the officer has been killed while in the performance of his duty.

Then follows subdivision 2 of section 96, under which appellants claim, and which reads as follows: "When a member of the department shall die from causes other than those specified in subdivision (1) of this section after ten years of service, then his widow, and if there be none, then his children, and if there be no widow or children, then his mother, if dependent upon him for support, shall be entitled to the sum of one thousand dollars."

To sustain their first contention that, under the charter of the city of Oakland, the family of service-pensioned officers are not entitled to participate in the police pension fund after the death of such officers, respondents have cited the case of *Edwards v. Sweigert*, 15 Cal. App. 503, [115 Pac. 256]. In that case the construction of the police pension fund provisions of the city and county of San Francisco (Stats. 1899, chap. X, art. VIII, p. 332) was under consideration. By section 3 of that charter, provision is made for the retirement and pensioning of any member of the department disabled by reason of any bodily injury received in the performance of his duty; the pension "to be paid to him during his life and to cease at his death." Section 6 thereof provides for the pensioning of certain dependent relatives of any member who,

after ten years' service, shall die from natural causes, and concludes as follows: "but the provisions of this section shall not apply to any member of the department who shall have received any pension under the terms of this charter." It will thus be seen that the San Francisco charter in express terms denied the right of a pension to the family of an officer who had received a pension during his life; and it is upon these provisions that the decision in the Edwards case was based. It is true that the charter of the city of Oakland provides that service pensions shall cease at the death of the member, but nowhere is there a provision similar to the one contained in section 6 of the San Francisco charter, denying the family the right to a pension for the reason that the officer had received one during his life.

Here the appellants are not claiming a continuation of the pension received by the officer during his lifetime, but are seeking the benefit provided for under an entirely different section, which makes no reference to the fact as to whether or not the deceased officer had been in his lifetime the recipient of a pension. The only theory upon which the claim of the respondents can be upheld is that the charter of the city of Oakland, in providing, under sections 94 and 95, for the pensions therein specified, has the effect of excluding the members of the family of such officer from the benefits provided for under subdivision 2 of section 96 of the act, and limits this benefit to relatives of such officers who have never received a pension.

This position cannot be maintained. The only purpose of the use of the phrase "and to cease at his death" was undoubtedly to restrain some relative from claiming the monthly pension provided for in subdivision 1 of section 96, where the officer was killed in the performance of his duty. (*Edwards v. Sweigert*, 15 Cal. App. 503, [115 Pac. 256].) Irrespective of this conclusion, however, we are of the opinion that appellants are not entitled to the relief demanded, for the reason that they are not children within the meaning of subdivision 2, section 96 of the charter of the city of Oakland. The meaning of the word "children" in its primary significance is generally understood to have reference to minor sons and daughters of a person, and in cases where the word has received a larger and more extended construction, it has been based upon the intention of the law-making power to se

extend it. In such cases the construction of the term depends upon the context and surrounding circumstances. Of course the word when used as expressive of relationship includes sons and daughters of whatever age, but when used in reference to age is confined to minors. There are, however, numerous cases where the exact meaning of the word has been questioned, and it has required judicial interpretation to determine in what sense it was used. This uncertainty has arisen in such actions as those prosecuted for the death of a person by wrongful act, under exemptions; statutes against the sale of liquor; poor laws; questions of heirship; adoption proceedings; citizenship; actions for injury to children; questions concerning descent; actions permitting a recovery in cases of homicide; actions by infirm and indigent children; and numerous other actions.

Courts of various jurisdictions are not in entire harmony in the construction to be given to the term when used in the particular character of cases above enumerated. (Words and Phrases, vol. 2, p. 1115, etc.) To arrive at the legislative intent the original purpose and object of the legislation must be considered. The term as contained in the act under consideration, in our opinion, was not intended to be used in the larger sense of sons and daughters, for it was certainly not contemplated by the framers of the charter that provision should be made for grown sons and daughters. Unmistakably the purpose of the whole act was to make provision for aged and infirm officers and certain necessitous relatives and minor children.

To permit adult children to enjoy or participate in a limited fund such as this is inconsistent with the general idea and purposes of its creation. Legislation of this character is designed to protect minors and necessitous dependents, rather than to create a system of benefactions for the advantage of relatives, and such design is indicated by the different provisions of the act, to which we must look for the legislative intent. Sections 94 and 95 of the act make provision for aged, infirm, and disabled members by providing for a pension. Section 96, subdivision 1, provides for relief for the family of an officer killed in the performance of his duty, and as before stated, is as follows: (a) Should the decedent be married, his widow shall, as long as she remains single, be paid a pension equal to one-half of his salary.

(b) Where decedent leaves no widow but leaves an orphan child or children under the age of sixteen years and the widow dies without marrying while such child or children are under the age of sixteen years, such child or children collectively shall receive a pension equal to one-half the salary attached to the decedent's position, provided that no child shall receive any such pension after attaining the age of sixteen years. (c) Where there is no widow or orphan child or children but a parent or parents dependent solely upon decedent for support, they are entitled to a pension during such time as the board shall determine its necessity. And then follows subdivision 2 of section 96, under which appellants claim, which provides that where a member dies from causes other than that specified in subdivision one, section 96, then his widow, and if there be none then his children, and if there be no children then his mother, if dependent upon him for support, shall receive one thousand dollars.

It will be noticed in paragraph B provision is made for an orphan child or children under sixteen years where there is no widow, while in subdivision C, in making provision for dependent parents, and referring expressly to such child or children in the preceding subdivision, the proviso that they shall be under sixteen years of age is omitted. Subdivision 2 of section 96, under which appellants claim, merely refers to this class of relatives as "children." Clearly the meaning that the framers of the charter had in mind was that only minor children under sixteen years of age as indicated in the preceding paragraphs should receive the benefits of the act. This interpretation is the only one that is consistent with the purpose of the act.

The order is affirmed.

Lennon, P. J., and Richards, J., concurred.

[Civ. No. 1330. First Appellate District.—July 8, 1914.]

**KERNST W. GRATZ, Respondent, v. JACOB SCHULER
et al., Appellants.**

FRAUD—ACTION TO RECOVER FOR FALSE REPRESENTATIONS—SHOWING NECESSARY TO BE MADE BY PLAINTIFF.—Fraud is the basis of an action for damages for deceit; and when such action arises out of alleged false representations of a material fact the plaintiff, in order to prevail, must ordinarily show not only that such representations were knowingly false and made with intent to deceive, but that the plaintiff, relying upon such false representations and while acting with reasonable prudence, was thereby deceived into doing something to his detriment.

ID.—RELIANCE UPON FALSE REPRESENTATIONS—OPPORTUNITY FOR INVESTIGATION.—If one party to a contract is justified in relying and does in fact rely upon false representations, his right of action for rescission or for damages for deceit is not destroyed merely because he does not avail himself of the means of knowledge immediately at hand as to the truth or falsity of the representations; but if he does avail himself of an opportunity to test the truth of the representations made, and thereby discovers prior to the consummation of the contract that such representations are false, he will not be heard to say that he was deceived by them.

ID.—SALE OF PANORAMA PICTURE MACHINE—REPRESENTATIONS BY SELLER AS TO EARNING CAPACITY.—The buyer of a panorama picture machine cannot recover damages for false representations made by the seller as to its earning capacity, if it appears that, before the consummation of the sale, a test exhibition was had at which the receipts fell far below the earning capacity as represented.

ID.—REPRESENTATION AS TO RENTAL VALUE OF DEVICE.—After thus having discovered the falsity of the representations of the earning capacity of the panorama, the buyer is not entitled to recover damages on the ground of an alleged false representation that the panorama could be placed in a certain amusement place for a specified monthly rental, the truth or falsity of which representation was readily ascertainable.

ID.—FALSE STATEMENT AS TO ONE MATTER—NOTICE THAT OTHER STATEMENTS MAY BE FALSE.—Where a party to a contract ascertains that the other party has falsely represented one material matter in the transaction, it is notice to him that the representations as to other matters may also be false, and it is therefore incumbent upon him to thereafter make a full investigation as to the truth or falsity of all such matters.

ID.—INTOXICATION OF BUYER—SUBSEQUENT RATIFICATION OF TRANSACTION.—If the buyer was so intoxicated during the original negotia-

tions for the sale of the panorama that he did not realize what he was doing, his subsequent consummation of the sale when sober constitutes a ratification of the original agreement which precludes him from repudiating the transaction, or asserting that advantage was taken of his intoxicated condition to defraud him.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

F. J. Castelhun, for Appellants.

Henry H. Davis, and A. F. Patterson, for Respondent.

LENNON, P. J.—In this action the plaintiff sought and recovered damages for fraud and deceit alleged to have been perpetrated upon him by the defendants in the negotiation and consummation of an agreement for the purchase and sale of a picture machine, known as the "Kaiser Panorama," which the defendants owned and, at the time of the sale, were exhibiting at a place of public amusement in the city and county of San Francisco. The fraud and deceit complained of in the plaintiff's complaint consisted of the following alleged false representations by the defendants: 1. That the defendants had paid the sum of one thousand nine hundred dollars for the panorama; 2. That because of its earning capacity it was worth the sum of one thousand nine hundred dollars for exhibition purposes; 3. That the panorama had been earning twenty dollars a day; 4. That the defendants had been offered one hundred dollars per month to exhibit it at Idora Park in the city of Oakland; and, 5. That it was a valuable device for exhibition purposes, and would earn for the plaintiff the sum of twenty dollars per day.

Plaintiff's complaint further averred that the defendants willfully and knowingly made such alleged false representations with the intent and for the purpose of cheating and defrauding the plaintiff; and that, believing such false representations and relying solely thereon, he purchased the panorama and paid therefor the sum of one thousand one hundred dollars.

All of the material allegations of the plaintiff's complaint were denied by the answer of the defendants. The issues thus raised were tried with a jury, and a verdict rendered for the plaintiff in the sum of one thousand dollars. From the judgment entered thereon and from an order denying a new trial the defendants have appealed.

The insufficiency of the evidence to support the verdict is the principal point relied upon for a reversal. The point is well taken. The case of the plaintiff, in so far as the making and falsity of the representations were concerned, was rested entirely upon his own testimony, and such testimony did not in the slightest degree tend to show the falsity of the defendants' alleged representations concerning the original cost of the panorama. Upon the other hand, the testimony of the defendants, uncontradicted and unimpeached either by direct or circumstantial evidence, was to the effect that they had paid one thousand nine hundred dollars for the panorama. Plainly, therefore, the verdict cannot be supported upon the theory that the evidence shows that the defendants falsely represented the original cost of the panorama.

We have searched the record in vain for any evidence which even remotely tends to support the allegations of the complaint that the defendants represented to the plaintiff that the panorama would earn for him the sum of twenty dollars per day. In this behalf the plaintiff's testimony in its entirety reveals nothing more than that the defendants said to him when negotiating the sale that they had been offered one hundred dollars per month to exhibit the panorama at Idora Park, and that "it makes lots of money; . . . you can bring it to Idora Park and . . . rent it out."

Conceding that the false representation concerning the future earning capacity of the panorama would, under all of the circumstances of the present case, constitute a good cause of action for fraud and deceit, nevertheless it is clear that the plaintiff's testimony upon this phase of the case would not support a finding that the defendants had falsely represented that the panorama would earn a specified sum per day. Stripped of immaterial matters, the sum and substance of plaintiff's testimony upon direct and cross-examination is that he was induced to pay the sum of eleven hundred dollars for the panorama solely because of the representation that it had in the past earned twenty dollars per day, and

that he could place it in Idora Park at a monthly rental of one hundred dollars. Further testifying in this behalf the plaintiff in effect said that while the statement as to past earnings influenced him to buy the panorama, nevertheless the representation that he could rent it to Idora Park had to a greater extent influenced him, because there it "would pay more interest on the money than the German Bank."

It follows that the verdict and judgment can be sustained only upon the theory that the evidence shows that the plaintiff was induced to purchase and part with his money solely by reason of the false representation that the panorama had been earning twenty dollars per day, and that he could rent it to the management of Idora Park for one hundred dollars per month. While the conflict in the evidence upon this phase of the case was resolved in favor of the plaintiff, we are satisfied that under all of the circumstances of the transaction in suit, such representations, even if falsely made, were not as a matter of law sufficient to warrant a verdict and judgment for damages upon the ground of deceit.

Fraud is the basis of an action for damages for deceit; and when such action arises out of alleged false representations of a material fact the plaintiff, in order to prevail, must ordinarily show not only that such representations were knowingly false and made with intent to deceive, but that the plaintiff, relying upon such false representations and while acting with reasonable prudence, was thereby deceived into doing something to his detriment.

It may be conceded that the undisputed fact in the present case, that the panorama never at any time after the plaintiff finally purchased it earned more than five dollars per day, was sufficient to warrant the finding of the jury implied from the verdict that the representations of the defendants as to its previous earnings were false and fraudulent (*Del Vecchio v. Savelli*, 10 Cal. App. 79, [101 Pac. 32]). Therefore we would have but little difficulty in sustaining the judgment if the evidence upon the whole case was sufficient to warrant the inference that the plaintiff relied upon and was in fact deceived by such representations. But the evidence will not justify any such inference. To the contrary the evidence clearly and without conflict shows that the plaintiff did not rely upon and was not deceived by the statement that the panorama had been earning twenty dollars per day while

owned and operated by the defendants. That this is so is shown by the plaintiff's own testimony to the effect that, upon the payment of fifty dollars on account, he was given possession of the panorama, and during the three weeks following gave three exhibitions at the original stand "to see what it was earning." The receipts of the first exhibition amounted to \$12.50; the second exhibition a week after brought but seventy-five cents to the box office; the receipts of the third exhibition given a week after the second amounted to but fifteen cents. Notwithstanding this actual demonstration of the real earning capacity of the panorama the plaintiff, without further representations of the defendants, completed the purchase by the payment of the balance of the price originally agreed upon. Surely under these circumstances, it cannot be said that the evidence shows that the plaintiff was justified in relying solely upon the representations of the defendants that the panorama had been earning twenty dollars per day. Generally speaking, if one party to a contract is justified in relying and does in fact rely upon false representations, his right of action for rescission or for damages for deceit is not destroyed merely because he did not avail himself of the means of knowledge immediately at hand as to the truth or falsity of the representations (*Ruhl v. Mott*, 120 Cal. 668, [53 Pac. 304]; *Neher v. Hansen*, 12 Cal. App. 370, [107 Pac. 565]; *Tarke v. Bingham*, 123 Cal. 163, [55 Pac. 759]; *Willey v. Clements*, 146 Cal. 91, [79 Pac. 850]); but if he does avail himself of an opportunity to test the truth of the representations made, and thereby discovers prior to the consummation of the contract that such representations were false, he will not be heard to say that he was deceived by them. We take it that this proposition needs no authority to support it. Assuming that the plaintiff was justified in relying and acting upon the representation that the defendants had been offered one hundred dollars per month to exhibit the panorama at Idora Park, and that the plaintiff, if he purchased the panorama, could rent it to that park, still these were facts which were readily susceptible of verification, and under the particular circumstances of the present case, should have been verified by the plaintiff before he purchased and paid for the panorama. Ordinarily perhaps this might not be so; but having ascertained that the defendants falsely represented one material matter in the transaction, this was

notice that the defendants may have been false in all else that they said; and therefore it was incumbent upon the plaintiff thereafter to make a full investigation as to the truth or falsity of every other material representation. This is so, because the law does not undertake the care of persons who, with notice of a fraud and the means of prevention at hand, will not take care of themselves (*Ruhl v. Mott*, 120 Cal. 668, [53 Pac. 304]; *Bacon v. Soule*, 19 Cal. App. 428, [126 Pac. 384]).

During the course of plaintiff's testimony it was incidentally developed that during the negotiations for the sale of the panorama the plaintiff became intoxicated from drinking beer supplied to him by the defendants, and that while so intoxicated he made the first payment of fifty dollars on account. We are at a loss to conceive how this fact can be availed of in support of the verdict. In the first place the plaintiff's complaint did not plead or attempt to plead such fact as a part of his cause of action; in the second place the uncontradicted evidence is to the effect that the purchase of the panorama was not completed until some three weeks after the deposit had been paid on account; and the evidence does not show, nor is it contended here, that the plaintiff was intoxicated at that time. Conceding that the plaintiff may have been so intoxicated during the original negotiations for the sale of the panorama that he did not realize what he was doing, nevertheless, having completed the same when he was undoubtedly sober, this was a ratification of the original agreement, which precludes the plaintiff from repudiating the transaction, or asserting that advantage was taken of his intoxicated condition to defraud and deceive him.

For the reasons stated the judgment and order appealed from are reversed.

Kerrigan, J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on August 6, 1914, and the following opinion then rendered thereon:

LENNON, P. J.—In fairness to the plaintiff (respondent) in the above-entitled action, the statement of the facts of the case in the opinion heretofore rendered, reversing the judg-

ment of the lower court, should be modified in certain particulars.

While the testimony of the plaintiff is in part at least somewhat confused and uncertain, as to whether or not he personally conducted one or three exhibitions of the panorama purchased from the defendants, prior to the payment of the full purchase price, upon a further consideration of the record, still before us, we must confess that the plaintiff's testimony, when considered in its entirety, and liberally construed, is to the effect that after the payment of fifty dollars as a deposit, and before the payment of the full purchase price of the panorama, he personally conducted but one exhibition, the receipts of which, as stated in the opinion heretofore rendered, amounted to twelve dollars and fifty cents. The other two exhibitions mentioned in that opinion apparently were given by the plaintiff after he had paid the full amount of the purchase price. This correction of the statement of the facts of the case will not, however, operate to alter or in any wise impair the conclusion previously reached, that the plaintiff's testimony shows that he did not rely upon and was not deceived by the defendants' statement that the panorama had been earning twenty dollars per day while owned and operated by them. The result of the single exhibition given by the plaintiff prior to the payment of the purchase price should have been sufficient, we think, to put him upon further inquiry concerning the past earning capacity of the panorama. Moreover, the testimony of the plaintiff shows further that before he made the full payment of the purchase price, he called upon the defendants, and asked for the return of the fifty dollars deposit paid on account, because, as he said, "I did a very foolish thing to buy that thing. I made a very foolish bargain." It will thus be seen that, notwithstanding an actual demonstration of the earning capacity of the panorama, and knowledge of the fact that he had made a bad bargain, plaintiff completed the contract of sale by paying the balance of one thousand and fifty dollars, due on the purchase price.

Under these circumstances, it cannot be fairly said that the plaintiff was deceived into parting with the bulk of his money by the statements of the defendants that the panorama had previously earned for them the sum of twenty dollars per day; and therefore, in so far as the conclusion reached and here-

tofore expressed upon this phase of the case is concerned, it is immaterial whether the plaintiff gave more than one exhibition prior to the time he made the final payment on the purchase price of the panorama.

The petition for rehearing is denied.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 2, 1914.

[Civ. No. 1526. Second Appellate District.—July 8, 1914.]

MARY E. DRESSER, Plaintiff, v. LEVI ALLEN et al., Defendants; SYLVESTER KIPP, Appellant; MARY E. DRESSER et al., Respondents.

ACTION TO QUIET TITLE—PROCEEDINGS TO PUT IN POSSESSION—MATTERS DETERMINABLE.—In proceedings to put in possession a defendant who has recovered judgment in an action to quiet title, the court cannot determine any proprietary rights of a person in possession of the property who was not a party to the action.

ID.—PERSON IN POSSESSION WHO IS NOT PARTY TO ACTION—PRESUMPTION AND BURDEN OF PROOF AS TO RIGHTS.—If such person came into possession at any time after the commencement of the action, it is presumed that he came in under the plaintiff, and upon the issue pertaining to his right to remain in possession the burden is upon him to show affirmatively that his possession is rightful and under a title that has not been determined in the action, and that such possession was not taken by collusion with the plaintiff.

ID.—ABANDONMENT OR RELINQUISHMENT—WHETHER EFFECTUAL TO TRANSFER PROPERTY.—Abandonment of property cannot be made in favor of a particular individual, nor as a means of transfer from one person to another. Relinquishment by one to another is not abandonment.

ID.—WRIT OF POSSESSION—OCCUPANT NOT PARTY TO ORIGINAL ACTION—WHETHER MAY RESIST.—The enforcement of a judgment recovered in an action to quiet title cannot be resisted by a person not a party to the action, who asserts the right to retain the premises under a claim of possession adverse to the person against whom the judgment was awarded, when it appears that such claim is founded upon

the mere declaration of the latter of an abandonment of the premises to the former and recognition of his claim without any actual removal from the premises.

Id.—**ALIAS WRIT OF POSSESSION—WHEN LIES.**—In such a case the prevailing party is entitled to an *alias* writ of possession for the possession of the property.

APPEAL from an order of the Superior Court of San Diego County. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

Sylvester Kipp, and Haines & Haines, for Appellant.

E. S. Torrance for Respondents.

CONREY, P. J.—The defendant Sylvester Kipp presents this appeal from an order made and entered on August 2, 1912, whereby the court vacated a certain order of date April 29, 1912, upon James S. Dresser to show cause why an *alias* writ of possession should not issue against him on the judgment entered in said action, in so far as said order to show cause related to or affected the right of said James S. Dresser to the possession of the premises described in the judgment in this action; and whereby the superior court ordered that said *alias* writ of possession against said James S. Dresser should be denied and that he should recover his costs.

This action was commenced by Mary E. Dresser against Levi Allen, Sylvester Kipp, and H. F. Weis for the purpose of quieting plaintiff's title against the defendants. Defendant Kipp answered claiming title to the property described in the complaint, and the judgment of the court established his title against the plaintiff and awarded him a writ of possession against her. That judgment was affirmed in this court on November 20, 1911 (*Dresser v. Allen*, 17 Cal. App. 508, [120 Pac. 65]). A writ of possession having been issued on February 21, 1912, the same, with the sheriff's return indorsed thereon, was filed on April 20, 1912. The return shows that on March 16, 1912, the sheriff entered upon said premises and found said Mary E. Dresser upon the same and notified her that if she did not vacate said premises within ten days after said date, he would dispossess her of said premises by forcibly removing her from the same; that on the

twenty-sixth day of March, 1912, the sheriff again entered upon said premises described in said writ for the purpose of executing the same, and found that said Mary E. Dresser had vacated the said premises and that James S. Dresser and M. C. Dresser were upon said premises and claimed that they had adverse possession of said premises under a tax title, and claimed that such title was not derived from the plaintiff in said writ named. For said reasons the sheriff did not place the defendant Kipp in possession of the premises.

In response to the order to show cause, which was issued against Mary E. Dresser, James S. Dresser, and Mary Caroline Dresser, the said Mary E. Dresser answered that within ten days after March 16, 1912, she did wholly vacate and abandon said premises and does not claim any right to the possession thereof; and Mary Caroline Dresser answered that she has never claimed and does not claim any possession or right of possession of said premises. The questions at issue herein rest wholly between the defendant Kipp and the respondent James S. Dresser.

The respondent was not a party to the action and his claim of right to retain possession of the premises is based upon the contention that he is, and since a time long prior to the commencement of this action (which was on October 20, 1909) he has been in possession of the described real property adversely to the plaintiff and all others; that ever since the nineteenth day of November, 1900, he has been in the exclusive possession of said premises for himself in his own right under a claim of title thereto made by him in good faith under a certain tax-deed presented to the court as a part of his answer to the order to show cause.

It is conceded that in this proceeding the court could not try or determine any proprietary rights which the respondent may have under his claim of title. We are here concerned only with the matter of right to possession under the writ. If respondent came into possession at any time after the commencement of this action, it is presumed that he came in under the plaintiff, and upon the issue pertaining to his right to remain in possession the burden is upon him to show affirmatively that his possession is rightful and under a title that has not been determined in the action, and that such possession was not taken by collusion with the plaintiff. The fruits of a successful litigation cannot be wrested from the

prevailing party and the process of the courts evaded upon a mere claim set up under suspicious circumstances, resting upon affidavits alone, unless the case made by that kind of proof is reasonably satisfactory. (*Baum v. Roper*, 1 Cal. App. 435, 439, [82 Pac. 390], and cases there cited.)

The order of the superior court made after hearing on the order to show cause carries with it the implied finding that the respondent's possession began prior to the commencement of this action, or that if it began subsequent thereto, he has satisfactorily shown to the court that his possession has been taken and maintained in good faith without collusion with the plaintiff and adversely to her.

On his application for the order to show cause the appellant presented a typewritten transcript (not certified) of the official court stenographer's minutes of the trial of this action, the said transcript being attached to an affidavit of the applicant in which he stated that he was present at the trial, heard all of the evidence and proceedings therein and has a clear and distinct recollection of the same, and that said transcript is a true and correct statement of the evidence given by the witnesses Mary E. Dresser, James S. Dresser, and Mary Caroline Dresser, and of the whole thereof, "as affiant now remembers the same." Counsel for respondent insists that this affidavit is not sufficient to establish the transcript as a correct statement of the evidence, and that at all events the testimony then given by Mary E. Dresser and Mary Caroline Dresser is not binding upon him. Giving the respondent the full benefit of his objection to the testimony of others than himself, we have for consideration the testimony given by the respondent and his explanation thereof as contained in his affidavit filed in this proceeding. Mary E. Dresser is the mother of respondent, who is an unmarried man. In 1896 Mrs. Dresser made a contract of purchase of the land in controversy whereby, upon certain payments being made, the land was to be conveyed to her. Full payment never was made and a deed of conveyance has never been made to the purchaser or any one claiming under her. Mrs. Dresser obtained possession from the agent of the vendor in 1896. She established her home upon the premises with her son, the said James S. Dresser, then about twenty-seven years of age. Various improvements were made, in which the respondent took an active part, and in his affidavit he admits that his

mother went into possession under the contract and remained in possession thereunder until the delivery to him of the tax-deed under which he claims; said deed having been delivered to respondent in November, 1900. At the trial of this action and while the plaintiff was endeavoring to establish the fact of her long continued possession of this property, the respondent (on December 13, 1909) testified as a witness in her behalf and stated, among other things, that he was a member of his mother's family and had been such for the last fourteen years; that in making sundry improvements on the premises in controversy he did that work for his mother and was acting for her; "she bought the place for her home and I was fixing it up for her"; that his mother had gone into possession under the agreement of 1896; "Q. And she has been in possession ever since? A. Yes, sir. Q. Under that contract? A. Yes, sir."

The present claim of the respondent is that, ever since November 19, 1900, when said tax-deed was delivered to him, he has been in the exclusive possession of said premises for himself and in his own right under a claim of title thereto made by him in good faith under said deed; that in the summer of 1900 his mother, the plaintiff, informed him that she intended to abandon said contract and would not make any further payments thereunder; that he purchased said tax-title after receiving such information from his mother, and that his intention was that he "would endeavor to obtain a tax-title to said premises and acquire title thereunder by adverse possession"; that having purchased the certificate of sale from the original purchaser at the tax-sale, the respondent, on October 9, 1900, made service upon Mary E. Dresser of a written notice to redeem and thereafter in due time said tax-deed was issued to him; that upon receiving said deed respondent informed his mother of his intention as above stated, and that he then claimed and would continue to claim possession of said premises adversely to all persons whomsoever; "that thereupon his said mother declared to him that she had abandoned her right to possession of said premises under her contract with H. S. Mulford, and that she recognized the right of said James S. Dresser to the exclusive possession of said premises as against herself, based on his claim of title under said tax-deed; that his mother then agreed to live with him on said premises as his housekeeper." Re-

spondent further stated in his sworn answer and in his affidavit certain other facts slightly tending to support his claim of adverse possession since November, 1900. As the testimony is shown to be conflicting and inconsistent, we are bound to accept the conclusion of the superior court thereon, unless this result is controlled by admissions contained in respondent's said answer. But in our opinion the facts stated by the respondent in his answer contain admissions which preclude him from holding possession against the writ awarded to the appellant by the judgment herein. When Mrs. Dresser declared to respondent that she "had abandoned her right to possession" and that she "recognized the right" of respondent to "exclusive possession as against herself," she did not in fact abandon her actual possession in any manner whatever, except this, that without removing from the premises she attempted to abandon the same *to the respondent*. Abandonment cannot be made in favor of a particular individual, nor as a means of transfer from one party to another. (*Stephens v. Mansfield*, 11 Cal. 363; *Richardson v. McNulty*, 24 Cal. 339, 344.) Relinquishment by one to another is not abandonment. Nothing more than this was done or attempted in the present case. It being thus established that Mary E. Dresser's possession of the land was never abandoned by her until on or after March 16, 1912, and that the only possession obtained by respondent was by means of and subordinate to that of his mother, he cannot be permitted to resist the enforcement of the judgment in favor of appellant.

The order appealed from is reversed, and the superior court is directed to enter an order granting appellant's application for the *alias* writ.

James, J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on August 5, 1914, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 2, 1914.

[Civ. No. 1360. First Appellate District.—July 10, 1914.]

HOGAN LUMBER COMPANY (a Corporation), Appellant,
v. **CITY OF OAKLAND** (a Municipal Corporation),
Respondent.

FIXTURES—TEMPORARY WHARF USED TO FACILITATE CONSTRUCTION OF QUAY WALL.—A wharf built upon piles driven into the ground on the land side of a quay wall along a city water front and used to pass materials over and facilitate the construction of the quay and intended to be removed when the quay is finished, is not a fixture, but personal property, and upon the insolvency of the contractor and his abandonment of the work the materials in the wharf do not become the property of the city under sections 1196 and 1200 of the Code of Civil Procedure.

ID.—TEST FOR DETERMINING WHETHER OR NOT STRUCTURE IS FIXTURE.—Whether a structure is a fixture or not depends upon the nature or character of the act by which it was erected, and the purpose for which it was intended to be used.

ID.—MATERIALS AS PROPERTY OF OWNER OF STRUCTURE—SECTIONS 1196 AND 1200 OF THE CODE OF CIVIL PROCEDURE.—Sections 1196 and 1200 (since repealed) of the Code of Civil Procedure apply, and make materials furnished the property of the owner of the structure when they are to become part of the structure, but where they are not to be used in and incorporated into the structure to be built, they cannot be said to belong to the owner.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. N. D. Arnot, Judge presiding.

The facts are stated in the opinion of the court.

Stetson & Koford, for Appellant.

Ben F. Woolner, and Chas. A. Beardsley, for Respondent.

KERRIGAN, J.—This is an appeal from a judgment and from an order denying a motion for a new trial in an action of claim and delivery.

Very briefly the facts are these: Hansbrough Brothers Company entered into a contract with the city of Oakland to build a quay wall along a certain portion of the Oakland water front. For use in the construction of the quay wall,

this company, with materials furnished by it, built a temporary wharf or platform on the land side of said wall, which was used to pass materials over, and to facilitate the work of construction. When the work was partially completed, the Hansbrough Brothers Company became insolvent and abandoned the work, and were adjudged bankrupt by the United States district court.

Upon abandonment, the city of Oakland took possession of the work, including the wharf, runway, or platform, as it was variously called, advertised for bids, and ultimately let a contract for the completion of the work to the Healy-Tibbetts Construction Company. The trustees in bankruptcy, under regular proceedings, sold to the plaintiff herein a quantity of lumber on the premises, including the lumber in the wharf or runway.

Upon demand defendant refused to give up possession of the part of the lumber in controversy, whereupon this proceeding was commenced.

It is not claimed that the material of the wharf was to become a part of the quay wall; but defendant does claim that by reason of the manner of the construction of the wharf, it became real property, and that therefore an action in claim and delivery will not lie. It also claims that, under the terms of section 1200 (since repealed) and 1196 of the Code of Civil Procedure, the materials having been erected "on the ground," became the property of the defendant.

Neither of these contentions commends itself to us with much force. As to the first contention, it is true that the wharf or substructure was built on piles driven into the ground; but it was plainly the intention of the parties, and conceded to be the fact, that it was of a temporary nature, and that, when the quay was finished, the wharf was to be cleared away, and the materials constituting the wharf were to be taken possession of by whoever at that time might be the owner thereof. Under these circumstances, the authorities support the conclusion that the materials are to be regarded as personal property. Whether a structure is a fixture or not depends upon the nature or character of the act by which it is erected, and the purpose for which it was intended to be used. (*Hopewell Mill v. Taunton Savings Bank*, 150 Mass. 519, [15 Am. St. Rep. 235, 6 L. R. A. 249, 23 N. E. 327]; *Binkley v. Forkner*, 117 Ind. 176, [3 L. R. A. 33, 19

N. E. 753], 19 Cyc. 1045-1048; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 250, [13 Am. St. Rep. 147, 22 Pac. 184]; *Jordan v. Myres*, 126 Cal. 565, 569, [58 Pac. 1061]; *Stimson v. Los Angeles Traction Co.*, 141 Cal. 30, [74 Pac. 357].)

As to the other point, little need be said. Sections 1196 and 1200 of the Code of Civil Procedure, apply, and make the materials furnished the property of the owner of the structure when they are to become part of the structure, but where, as here, they are not to be used in and incorporated into the structure to be built, they cannot be said to belong to the owner. (*Steiger etc. Pottery Works v. Sonoma*, 9 Cal. App. 698, [100 Pac. 714]; *California P. C. Co. v. Wentworth Co.*, 16 Cal. App. 692-701, [118 Pac. 103, 113]; *Hamilton v. Delhi Mining Co.*, 118 Cal. 148, [50 Pac. 378].)

Under the circumstances of this case the defendant, it would seem, has no more right to these materials constituting the temporary wharf, than it would have to the tools or machinery of the contractor and mechanics. The circumstance that the wharf was to be wrecked and the materials taken away by the original contractor or his assignee, shows not only that they were not a fixture, but also that no property right therein passed to the defendant. There is no circumstance in the case that will warrant the conclusion that there was either an express or implied understanding between the contractor who erected the wharf, and the defendant, that the wharf was to remain on the premises any longer than its use was required by such contractor. Nor is there any ground in the record for the argument that the contractor abandoned the materials contained in the wharf and left them on the premises, under such circumstances that he or his assignee would be estopped to claim them before the quay wall was finished.

The judgment and order are reversed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 8, 1914.

[Civ. No. 1475. Second Appellate District.—July 14, 1914.]

WILBERT MORGRAGE, Appellant, v. THE NATIONAL BANK OF CALIFORNIA (a Corporation), Respondent.

COSTS ON APPEAL—FAILURE TO INSERT PROVISION IN REMITTITUR—MOTION TO RECALL AND INSERT PROVISION.—Where a judgment is affirmed by the appellate court, but the *remittitur* contains no provision that the respondent shall recover his costs on appeal, the *remittitur* may be recalled on motion and the clerk be directed to issue a new one containing a provision for such costs.

MOTION by respondent to recall Remittitur.

The facts are stated in the opinion of the court.

W. N. Goodwin, and Hunsaker & Britt, for Appellant.

Trippet, Chapman & Biby, for Respondent.

THE COURT.—The judgment herein was, on appeal to this court, affirmed in an opinion filed herein on the twenty-sixth day of February, 1914. (*Morgrage v. National Bank of Cal.*, 24 Cal. App. 103, [140 Pac. 300].) At the expiration of sixty days the clerk of the court issued to the court below a *remittitur* which contained no provision to the effect that respondent should recover its costs on appeal. On June 16, 1914, respondent moved the court for a recall of the *remittitur* and the issuance of a new one containing a judgment in its favor for such costs. No doubt exists that under the provisions of section 1027 of the Code of Civil Procedure, as amended in 1913, [Stats. 1913, p. 1033], respondent is entitled to costs as therein provided and which, as stated, were omitted from the judgment of this court. Upon authority of the opinion of the supreme court, filed May 26, 1914, in the case of *Estate of Prager*, 167 Cal. 737 [141 Pac. 369], which involved the identical question here presented, it is ordered that the *remittitur* heretofore issued be recalled, and the clerk is directed to issue in lieu thereof a new *remittitur*, inserting therein a provision that respondent recover its costs on appeal.

[Civ. No. 1381. First Appellate District.—July 14, 1914.]

ERNEST EINERTSEN, Respondent, v. UNITED RAILROADS OF SAN FRANCISCO (a Corporation), Appellant.

NEGLIGENCE—STREET RAILWAYS—OPERATION OF CAR NEAR TRUCK—INJURY TO PASSENGER ON STEPS.—In this action against a street railway company by a passenger to recover for personal injuries sustained while riding on the steps of a car by coming in contact with a truck standing in close proximity to the track, the trial court was warranted in finding that the car was operated at an unsafe and dangerous speed, considering that the truck occupied a position so near the car as to be dangerous to occupants of certain parts thereof.

ID.—PASSENGER RIDING ON STEPS OF STREET CAR—INABILITY TO GET INSIDE BECAUSE OF CROWD ON STEPS.—The evidence is sufficient to sustain the findings of the trial court that the defendant railroad company negligently permitted the platform and steps of the car where the plaintiff was standing to remain in a congested condition, so that he could not obtain access to the interior of the car and thereby escape being injured, and that the injuries sustained by him were not directly or proximately caused by his own negligence or by any want of care on his part, but were the result of the carelessness and neglect of the employees of the defendant.

ID.—QUESTIONS OF FACT FOR TRIAL COURT.—The questions as to whether or not the plaintiff exercised care to avoid the injuries, and whether the defendant was negligent in permitting the car steps to become congested, were questions of fact for the trial court.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Wm. M. Abbott, Wm. M. Cannon, and Kingsley W. Cannon, for Appellant.

McNair & Stoker, for Respondent.

KERRIGAN, J.—This action was brought to recover damages for personal injuries sustained by plaintiff, and this appeal is from a judgment rendered in his favor and from an order denying a new trial.

The injuries were sustained by plaintiff while a passenger on one of the cars of the defendant company.

The complaint recites: That, on the twenty-first day of October, 1907, plaintiff boarded a car at a point on Mission Street, near the foot thereof, in the city and county of San Francisco, said car being operated by defendant for the convenience of passengers; that plaintiff tendered and the conductor of said car accepted and received his fare; that at the time plaintiff was standing at the bottom step of the rear platform on the northerly side of the car, which was west-bound, the steps and platform of which were crowded with passengers to such an extent that plaintiff was unable to enter the interior of the car, although he attempted so to do; that there was sufficient space in the interior of the car for all of the passengers thereon; and that, at the time of receiving his injuries, plaintiff was making an effort to gain an entrance therein from the outside step upon which he was standing; that, while still standing upon said step, and while attempting to gain an entrance to the interior of the car, plaintiff observed a truck or van backed up against the curbing of Mission Street, with the front end thereof projecting out into said street, toward the track upon and over which the car was passing, and the plaintiff, realizing that he would be struck with the projecting end of said truck or van if the employees in charge of said car should attempt to pass thereby without stopping, the said car being operated at such a rapid rate the plaintiff could not with safety to himself alight therefrom, called upon the conductor in charge to stop the car, but the conductor did not heed his request; that, by reason of the car going at such a rapid rate of speed, which was not slackened in passing the projection, plaintiff was caught between the rear end of said car and the projecting front of said truck, and received the injuries which formed the basis of this action.

Plaintiff further alleged the negligent operation of the car at the rapid rate of speed, and the negligence of the defendant in permitting the rear steps and platform of the car to remain crowded and congested with passengers when there was sufficient space within the interior thereof.

The injuries received by plaintiff were alleged to be permanent, and to consist of a displacement and contusion of the liver, stomach, kidneys, and other abdominal organs, and the

bending and dislocation of the ribs, the bruising of his body in various places, and a violent shock to his nervous system.

A jury trial was waived, and the court rendered judgment in favor of the plaintiff and against the defendant for the sum of one thousand dollars, and his costs.

It is the claim of defendant that the judgment and order appealed from should be reversed for the reason that the evidence is insufficient to support the decision, and it argues:

1. That the evidence is insufficient to show that the defendant operated his car at a dangerous rate of speed.

2. That the evidence is insufficient to show actionable negligence in permitting the steps of the car to become crowded and congested.

3. That the evidence affirmatively and indisputably shows that the plaintiff was himself guilty of negligence, proximately contributing to his injuries.

The evidence relating to the circumstances under which the injuries were received is practically free from conflict upon the question of the speed of the car. The court found that defendant operated the car by and past the wagon at a rate of speed unsafe and dangerous to plaintiff in the position he occupied, and the defendant knew of the danger to which passengers were submitted by reason of the car being thus operated by and past said wagon. The question as to whether or not the rate of speed was unsafe and dangerous was one, considering all the surrounding circumstances, for the trial court to determine. Plaintiff testified that the car was moving at a "terrible speed"; another witness, a police officer, estimated the speed at eight or nine miles an hour. The reasonableness of the rate of speed at which a car is run is to be measured by the surrounding circumstances. A rate of speed may be dangerous or excessive under one set of circumstances, where it would not be so under others. We cannot say, as a matter of law, that a finding as to the rate of speed under a given set of circumstances is not warranted by the evidence, this being a fact for the trial court to determine from all the evidence presented. The close proximity of the wagon to the track was a very material circumstance to be considered in determining whether or not the rate of speed was excessive. From all the evidence produced at the trial, we feel convinced that the court was amply warranted in finding that the car was operated at an unsafe and danger-

ous speed, considering that the truck occupied a position so near to the car as to be dangerous to occupants of certain parts of the car.

The further contentions of appellant, that the evidence is insufficient to show actionable negligence in permitting the steps of the car to become crowded, and that the evidence indisputably shows that the plaintiff was himself guilty of negligence proximately contributing to his injuries, are so intimately connected that we will discuss them together.

Upon these questions, the court found that there was sufficient space in the interior of the car for all passengers then upon it, and that the defendant negligently permitted the platform and steps of the car where plaintiff was standing to remain in a congested condition, so that plaintiff could not obtain access to the interior of the car and thereby escape being injured, and that the injuries sustained by plaintiff were not directly or proximately caused by his own negligence or by any want of care on his part, but were the result of carelessness and neglect of the servants and employees of the defendant. Testimony of plaintiff shows that at the time he boarded the car there were passengers occupying the platform and steps, and that this crowded condition of that portion of the car prevented him from reaching its interior, although he endeavored to do so. Defendant sought to disprove this testimony by showing that another passenger boarded the car at another point on Mission Street, further west than did plaintiff, and that he proceeded up the steps of the car, and past the passengers standing thereon, and took a position at the rear of the platform, and defendant argues that if this witness could thus pass to a place of safety, plaintiff could have done likewise, and not having done so he was guilty of negligence in riding thus situated, and that he did so at his own risk. The plaintiff in his testimony showed a lack of certainty as to the intersecting street at which he boarded the car, but his testimony is positive to the point and is uncontradicted, that no one got on or off the car from the time he boarded it, and that the car did not stop from that time until the accident occurred.

At the rate of speed the car was traveling, it was a very short time after plaintiff boarded the car till the occurrence of the accident. Plaintiff testified that the car had only traveled two short blocks from his boarding point to where

the accident occurred, and that, during this time, he had paid his fare and was seeking to gain access to the interior of the car. He certainly could not know until he boarded the car that he would be prevented from gaining access to its interior—which the testimony shows was not crowded. Under these circumstances it cannot be said that his presence upon the step of the car, crowded though it was, constituted negligence. That plaintiff was exercising due care is shown by his undisputed testimony that, when within quite a distance of the wagon, realizing his danger, he called upon the conductor to stop the car, and at the same time endeavored, although unsuccessfully, to reach a place of safety.

The question as to whether or not the plaintiff exercised care to avoid the injuries was a question of fact for the trial court to determine. (*Seller v. Market St. Ry. Co.*, 139 Cal. 269, [72 Pac. 1006]; *Hoff v. Los Angeles Pacific Ry.*, 158 Cal. 596, [112 Pac. 53]; *Holloway v. Pasadena Ry. Co.*, 130 Cal. 177, [62 Pac. 478]; *Kimic v. San Jose & Los Gatos Ry.*, 156 Cal. 379, 386, [104 Pac. 986].)

The same may be said as to the question of whether or not defendant was negligent in permitting the steps of the car to be crowded and congested.

Both of these questions were determined adversely to the defendant by the trial court, upon evidence sufficient to sustain the findings; therefore the findings must be upheld.

For the reasons stated, the judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on August 13, 1914, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 11, 1914.

[Civ. No. 1560. Second Appellate District.—July 16, 1914.]

A. B. SPENCER, Respondent, v. LEGENE S. BARNES, Appellant.

PARTNERSHIP—WHAT CONSTITUTES—CO-OPERATION IN SALE OF MINING PROPERTIES—SINGLE VENTURE.—Where two persons enter into an oral agreement to obtain an option on certain mining properties and sell them at a profit which is to be divided between them, their agreement constitutes a partnership although the object thereof is a single venture only.

ID.—ACTION FOR ACCOUNTING—NECESSITY FOR DECREE DISSOLVING PARTNERSHIP.—In an action between the parties to such an agreement for an accounting of the profits arising from sales, it is not necessary that the complaint should pray for, or that the court should decree a dissolution of the partnership, if it sufficiently appears from the pleadings that the purpose of the partnership has been fully accomplished prior to the suit.

ID.—PROFITS ILLEGALLY MADE—RIGHT OF INNOCENT PARTNER TO ACCOUNTING.—If it appears in such action that the defendant has illegally obtained profits in the prosecution of the venture, the plaintiff may invoke the rule that an innocent member of a partnership, created for conducting a lawful business, is entitled to share in a profit which his partner has realized by misconduct in carrying on the business.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

John D. Pope, Oscar Lawler, and James E. Degnan, for Appellant.

Lewis R. Works, Andrew M. Strong, Antonio Orfila, and Francis Marion Etheridge, for Respondent.

SHAW, J.—This action grew out of an alleged agreement between plaintiff and defendant whereby, as copartners, they consummated a sale of certain iron mining properties, defendant receiving and appropriating to his own use the commission or profits derived from the making of such sale. The suit is to recover a specified sum and for an accounting.

Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant prosecutes this appeal.

It appears that in June, 1907, plaintiff was a resident of Tucson, Arizona, where he was engaged in some mining venture. Defendant resided in Long Beach, California, where he was engaged in the real estate business. There existed a relationship of some intimacy between their respective wives, between whom there was an interchange of letters in which there were mutual complaints of dull times. The wife of plaintiff wrote the wife of defendant to have her husband come to Tucson, where she felt sure defendant and plaintiff could find some properties to sell and make some money. Following this letter defendant went to Tucson, spending several days with plaintiff in looking over and inspecting certain mining properties (not involved in this action, but referred to in order to obtain a proper understanding of the situation), known as the Papago, Wilson, and Rumble properties. The prospect of a sale of these mines appears to have been the only subject of mutual interest during the first days of defendant's visit, neither at that time being cognizant of the iron properties the commissions for the sale of which constitute the subject of this suit. While plaintiff and defendant were inspecting the Papago and other properties the latter took some photographic views thereof, and on their return to Tucson they went to the studio of a photographer, with whom plaintiff was acquainted, to have these views developed. On the occasion of this visit and while discussing these photographic views, the photographer, W. B. Parker, stated that he was interested in some iron properties in Riverside County, California, and exhibited samples of ore therefrom, together with a blue-print of the properties, comprising some seventy claims, and mentioned the names of the owners thereof, with whom he and Walter W. Brown, who resided in Los Angeles, had been corresponding in an effort to get them together in order to make a sale thereof. Of these claims Parker owned fifteen, Walter W. Brown owned thirty, and The Colorado Fuel & Iron Company and Stevens, Dofflemyer, and McGregor owned twenty-five, which were patented. The profits derived from a sale of the Brown claims is the subject around which the controversy revolves. During the interview Barnes asked Parker if the properties

were for sale, to which the latter replied in the affirmative, but stated they were not yet in shape to present to any one owing to the fact that the parties had not all fixed a price upon their respective holdings, and further that some of the properties were held under an option to purchase which would expire about September first. Defendant then said to Parker: "If anything comes up on this and you get ready to do business on it, just speak to Mr. Spencer and it will be all right. He will let me know." Plaintiff testified that after this interview with Parker, it was agreed that plaintiff was to do all he could in Tucson in getting papers and things ready and send them to defendant, who was, at his own expense, to do the negotiating with prospective buyers, and if a sale was effected the profits should be divided. Mrs. Spencer the wife of plaintiff testified that the evening preceding defendant's departure for Long Beach he, in a conversation with plaintiff, said: "I will leave everything at this end of the line for you to look after and I will bear the expense, and then what is left of the profit we will divide." Defendant left Tucson about July 2d, returning to Long Beach, and plaintiff took up negotiations with Parker, transmitting to defendant by letter such information as he obtained. On August 28th defendant wired plaintiff to "get option and papers on Parker's property to me as soon as possible," which telegram was confirmed by letter of the same date wherein defendant stated: "I believe that is a property that we can handle." On September 9th defendant wrote to plaintiff, saying: "I will take Parker's proposition up this afternoon with that man Brown, of Los Angeles, as you suggest. . . . I have some people who have the money and will do business if we can only get it into shape so we can handle it. I believe I have received all your letters, and I appreciate your work in this. You have made the deal plain to me and I will go and see Brown this afternoon." On October 8th defendant wrote a lengthy letter to plaintiff upon the subject of the proposed deal, saying that he had seen Dofflemyer and stating: "I have his interest tied up, also Brown's, Stevens's, and in fact all of them except Parker and his people. . . . I have had to change the deal in regards to prices and terms, but I feel confident that we can make a sale now. I am selling a three-quarters interest in the twenty-five patented claims for \$262,500, on which we

will get a ten per cent commission. . . . I am selling Brown's 30 claims for \$100,000 net to him. . . . Brown signed the same kind of a paper as the one which I shall send you to have Mr. Parker and his people sign. . . . Now I am selling Parker's 15 claims for \$65,000, but I want you to tell him that is \$50,000 net to him; the \$15,000 goes to you and I, and I would like you to draw up some kind of an agreement that Mr. Parker can sign, showing that if the sale is made the \$15,000 is to be paid to us in the same manner as he gets his payments." The letter also refers to the Rumpel and Wilson property, defendant suggesting that plaintiff endeavor to get a thirty-day extension of their option on the same, and in reference to the deal generally, states: "I have already spent over \$300 on this deal and expect it will cost me about \$500 more before it is closed, but it is worth the money if we get it closed." There was an option contract for the purchase of Parker's claims at a price of fifty thousand dollars transmitted to plaintiff with the request that plaintiff obtain Parker's signature thereto. In this he failed for the reason, as stated by Parker, he would not sell for less than sixty-five thousand dollars, which price he eventually received upon the deal being consummated, defendant having procured from him a contract for a sale at said sum. It is unnecessary to quote further from the correspondence.

That the parties entered into a copartnership for the purpose of securing a contract with the owners and effecting a sale of the properties is not only shown by the answer, which admits that defendant and plaintiff entered into a verbal agreement to co-operate in selling the properties in question and agreed in the event of so doing to divide the profits, but is clearly shown by reference to the evidence. The fact that the subject of the agreement was a single venture only, as alleged in the answer, was immaterial; it was none the less a copartnership for such venture.

The court found the allegations of the answer, to the effect that plaintiff abandoned the copartnership enterprise long prior to the consummation of the sale, to be untrue. The claim of appellant that this finding is unsupported by the evidence is chiefly based upon a letter written by plaintiff to defendant on August 19th, wherein he says: "Please return to me by express all the maps, reports, and etc., which I sent you, and we will go out of the mining business. If

you care to do so, you can tell me what you wrote or wired south, for unless I know I am placed in a bad light with those people." Plaintiff testifies that this letter referred solely and alone to what was known as the Papago property, the owners of which resided in the south; that he was manager of said property and represented the owners thereof; that defendant was to write to the owners of the property giving references as to his standing and aid him in assembling the stock in escrow. The inference to be drawn from the testimony is that defendant in writing to the owners of the property had placed plaintiff in an embarrassing position with his employers. That it was intended to refer to this deal only, is corroborated by the fact that at the date of the letter, August 19th, nothing whatsoever, other than what occurred in the first interview with Parker, as heretofore stated, had been done by the parties toward securing a sale of the iron properties. Not only this, but the correspondence hereinbefore referred to and the conduct of the parties after August 19th clearly tend to show that plaintiff and defendant were jointly engaged in an effort to secure contracts, options or escrows which would enable them to negotiate a sale of the iron properties, either for a commission or at a price in excess of that fixed by the owners thereof, which, in case of the consummation of a sale, would afford them a profit, and that defendant understood the letter had reference solely and alone to the Papago property, of which plaintiff was manager, and the maps, reports, etc., of which, mentioned therein, had been placed in possession of defendant.

The answer alleged that the sole consideration for the contract of copartnership made with plaintiff was an agreement on the part of the latter to secure from the owners of the properties options thereon which defendant could use in negotiating sales of the property, and further alleged a failure on the part of plaintiff to secure such or any options for the sale of the properties. The record discloses a conflict of evidence touching this issue. Hence, the finding of the court that it was not agreed that plaintiff was to secure the options, as alleged, is conclusive upon this appeal. (*Anglo-California Bank v. Cerf*, 147 Cal. 384, [81 Pac. 1077].)

The court found that it was agreed between the parties that all expense incurred by defendant in the consummation of a sale of the property should be paid by defendant, and

further found that all moneys expended by him in negotiating said sale were provided and advanced by R. H. Sayers and S. H. Roberts, who were reimbursed for such advances by the vendors of the property out of the proceeds of the sale thereof. These findings are attacked for want of evidence to support them. The contention is without merit. The finding to the effect that defendant was to advance all expenses is clearly supported by the testimony given by plaintiff. While there is some evidence tending to show that defendant incurred expense in negotiating the sale, the record is silent as to what sum or sums he paid out, other than the three hundred dollars. Moreover, it appears, with little if any conflict of evidence, that Sayers and Roberts advanced the money to finance the making of the sale, each receiving from the proceeds of the sale of the Black Diamond group of mines, owned by Walter W. Brown, the sum of fifty thousand dollars as compensation for such advances.

Appellant insists the judgment must be reversed for the reason that there was no prayer in the complaint for a dissolution of the copartnership and no decree rendered dissolving the same. The general rule is, as contended by appellant, that where one partner as against another seeks an accounting of profits against his copartner, a court of equity will not decree an accounting without also adjudging a dissolution of the copartnership. (*Clark v. Hewitt*, 136 Cal. 77, [68 Pac. 303].) In our opinion, the case at bar presents an exception to this general rule. By the terms of the agreement, as alleged in the complaint and admitted by the answer, the parties entered into a partnership having for its sole purpose the sale of certain property described in the complaint. It appears from the pleadings that the sale was fully consummated prior to the institution of this action. Upon the making of the sale the purpose contemplated by the agreement was fully accomplished, save and except the payment to plaintiff of his share of the profits. The finding of the court to the effect that the partnership had never been abandoned was in response to an allegation of the answer which alleged an abandonment prior to the consummation of the sale. In our opinion, the pleadings must be construed as showing the copartnership had terminated, and hence there was no occasion for a decree of dissolution. No objection was made by defendant to the complaint upon the ground that it did not

ask for a dissolution, nor was any exception taken to the judgment as rendered upon such ground. The complaint did pray "for such other relief as to this court may seem just and proper." Under the facts presented, we think the court was justified in assuming that the copartnership was terminated, and therefore it was unnecessary to decree a dissolution. (See *Pettingill v. Jones*, 28 Kan. 535; *Meason v. Kaine*, 63 Pa. St. 335; *Myers v. Winn*, 16 Ill. 135.)

The court further found that in pursuance of the agreement of copartnership defendant, with the assistance of plaintiff, secured options on the properties in his own name for the joint benefit of plaintiff and himself, and on August 10, 1909, consummated a sale thereof to a corporation known as the Iron Chief Mining Company; that included in the properties sold to said Iron Chief Mining Company were thirty claims, known as the Black Diamond group, a five-sixths interest in which was owned by Walter W. Brown, whose interest was sold by defendant to said Iron Chief Mining Company for the sum of three hundred and thirty-seven thousand five hundred dollars; that the other sixth interest in said Black Diamond group was owned by defendant, he having acquired it from Brown as a commission for promoting the sale of Brown's interest in said property, and that the value of defendant's one-sixth interest so acquired from Brown in the Black Diamond group as a commission was the sum of seventeen thousand five hundred dollars. The court further found that, in addition to this sum of seventeen thousand five hundred dollars so received by defendant for the one-sixth interest in the Black Diamond group, he received from Walter W. Brown out of the three hundred and thirty-seven thousand five hundred dollars, proceeds so received by Brown from the sale of his interest in the Black Diamond group of mines, a secret commission and profit in the sum of one hundred and twenty-one thousand two hundred and fifty dollars.

As to this secret profit of one hundred and twenty-one thousand two hundred and fifty dollars, appellant pleads his own fraud and iniquity as a defense to the participation therein by plaintiff. A statement of the manner in which it was obtained is, briefly, as follows: Defendant had been for some time negotiating a sale of the properties to Edward

defendant in the action in the collection of one of the claims procured the making of a false affidavit, by reason of which fact the transaction was held to be illegal. It appeared, however, that the plaintiff who brought the suit for a share of the profits of the transaction in no wise participated in the illegal manner whereby the claim was collected. The court in holding that he was entitled to participation in the profits arising from this illegal transaction, said: "But the plaintiff was no party to this illegal contract, so far as anything appears, and therefore could not be affected by it. In this view, we cannot permit the defendant to allege his own iniquity, to the prejudice of an innocent person." As stated in the Pennington case, the refusal of the court to aid plaintiff in compelling defendant to disgorge the ill-gotten gains would furnish an incentive to such frauds as he had perpetrated, "for if a partner, by showing that he has cheated the customers of the partnership in all his dealings with them, can retain all the profits instead of only half, his temptations to iniquity are doubled." The authorities cited, together with *Van Tine v. Hilands*, 131 Fed. 124, and *Thwaites v. Coulthwaite*, L. R. (1896), 1 Ch. Div. 496, leave no question in our minds as to the right of plaintiff to participate in the ill-gotten profits of the transaction to the same extent that defendant is benefited thereby.

The judgment and order denying defendant's motion for a new trial are affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 11, 1914.

[Civ. No. 1603. Second Appellate District.—July 17, 1914.]

E. E. BALLAGH, City Clerk of the City of Maricopa (a Municipal Corporation), Petitioner, v. **THE SUPERIOR COURT OF KERN COUNTY** et al., Respondents.

MANDAMUS—APPEAL FROM ORDER GRANTING—STAY OF PROCEEDINGS—CONTEMPT IN DISOBEYING JUDGMENT.—A judgment granting a peremptory writ of mandate to compel a city clerk to place the name of a candidate on the official ballot, is stayed upon the taking of an appeal from the judgment and the giving of an appeal bond in the sum of three hundred dollars, and an order thereafter made, adjudging the appellant guilty of contempt for disobedience of the judgment, is in excess of the jurisdiction of the court.

ID.—SPECIAL PROCEEDING—APPEALABLE ORDERS—STAY OF PROCEEDINGS. An application for such writ is a special proceeding, from the judgment in which an appeal lies, as provided in section 939 of the Code of Civil Procedure; and section 949 of that code provides in such case, it not being a case specified in sections 942 to 945, both inclusive, that the giving of the undertaking specified in section 941 stays proceedings in the court below upon the judgment.

APPLICATION for a Writ of Review to annul an order adjudging petitioner guilty of contempt.

The facts are stated in the opinion of the court.

Davis, Kemp & Post, E. L. Foster, Charles A. Barnhart, L. B. Godward, and Geo. E. Whitaker, for Petitioner.

H. H. Bell, and Joseph H. Tam, for Respondents.

SHAW, J.—This is an application for a writ of review to annul an order of the court below adjudging petitioner guilty of contempt for the disobedience of its judgment.

Petitioner is city clerk of the city of Maricopa. On March 23, 1914, certain proceedings were instituted in the superior court, in and for the county of Kern, the purpose of which was to secure a writ of mandate directed to petitioner, as said city clerk, commanding him in his official capacity to place and print upon the official ballot to be used in the municipal election held in the city of Maricopa on April 13, 1914, the name of Frank Minium as a candidate for city trustee. Upon trial the court gave judgment in favor of the plaintiff in said

action, and ordered that a peremptory writ as prayed for in the complaint be issued and served upon defendant, all of which was duly done. Defendant in said action, who is petitioner here, refused to comply with the order and appealed from the judgment so rendered, and executed an undertaking in the sum of three hundred dollars, conditioned in accordance with the provisions of section 941 of the Code of Civil Procedure. Thereupon, the Honorable Milton T. Farmer, judge of the superior court of Kern County, issued an order requiring petitioner herein to show cause why he should not be adjudged guilty of contempt for failing to obey the order of said superior court commanding him to place the name of said plaintiff upon said municipal ballot, in response to which defendant appeared and showed that he had duly perfected an appeal from said judgment so rendered by the court. Notwithstanding this fact, the court adjudged him guilty of contempt in refusing to obey the order.

The contention of petitioner is that his appeal duly had and taken deprived the court of jurisdiction to make the order adjudging him guilty of contempt. This appears to be the settled law of the state. The action was a special proceeding, from the judgment in which an appeal lies, as provided in section 939 of the Code of Civil Procedure; and section 949 of the Code of Civil Procedure, provides in such case, it not being a case specified in sections 942 to 945, both inclusive, that the giving of the undertaking specified in section 941 of the Code of Civil Procedure, stays proceedings in the court below upon the judgment. In the case of *Stewart v. Superior Court*, 100 Cal. 543, [35 Pac. 156], where an injunction issued was in form mandatory, it was held that an appeal from the judgment accompanied by a bond as provided by section 941, operated as a *supersedeas* to stay execution of the writ. In the case of *Palache v. Hunt*, 64 Cal. 473, [2 Pac. 245], a judgment was rendered against petitioner wherein a writ of mandate was issued and from which judgment he prosecuted an appeal, giving an undertaking in the sum of three hundred dollars, and wherein the petitioner applied to the supreme court for a writ of mandate to be issued to the lower court compelling it to fix the amount of an additional undertaking. The court denied the writ upon the ground that the three hundred dollar undertaking, given in accordance with the provisions of section 941, was sufficient to stay the proceed-

ings. The court says: "We are therefore of opinion that an appeal may be taken to this court from a judgment of a superior court, granting or denying an application for a writ of *mandamus*, and that an undertaking in the sum of three hundred dollars, executed and conditioned according to the provisions of section 941 of the Code of Civil Procedure, stays the execution of the judgment pending the appeal."

We think the court below exceeded its jurisdiction in adjudging the petitioner guilty of contempt. It is, therefore, ordered that the order of the lower court, whereby petitioner was adjudged guilty of contempt and sentenced to pay a fine of one hundred and fifty dollars, be and the same is hereby set aside and annulled.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1359. First Appellate District.—July 17, 1914.]

ALDEN ANDERSON, Superintendent of Banks of the State of California, Appellant, v. **Y. NAWA et al.**, Respondents.

ACTION—MOTION TO DISMISS FOR DELAY IN SERVING SUMMONS—SPECIAL APPEARANCE.—The mere making and presentation of a motion to dismiss an action upon the ground of unreasonable delay in the service of summons is not a general appearance of the defendant which subjects him to the jurisdiction of the court for all of the purposes of the action.

ID.—ENFORCEMENT OF LIABILITY OF STOCKHOLDERS OF BANK—ACTION BY BANK COMMISSIONER—DISMISSAL FOR DELAY IN SERVING SUMMONS.—It is not an abuse of discretion to dismiss an action, brought by the bank commissioner against the stockholders of an insolvent banking corporation on behalf of its creditors, for a delay of two years and ten months in serving summons on the moving defendant, where it appears that the summons could have been served at all times without any difficulty, although it is made to appear in opposition to the motion that during all of such period the plaintiff was actively engaged in an investigation of the bank's assets, which, if successful, would thereby reduce the defendant's liability as stockholder.

ID.—INABILITY TO SERVE SOME OF DEFENDANTS NO EXCUSE FOR NOT SERVING OTHERS.—The difficulty of locating some of the defendants in such an action is not a sufficient excuse for delay in the

service of process upon a defendant whose whereabouts is known. The liability of such defendant as a stockholder is primary and independent, and in no sense and to no extent dependent or contingent upon the liability of the remaining defendants, and the court in its discretion might render a several judgment against him without regard to the liability of the remaining defendants, and regardless of whether or not any or all of them have been served with process.

ID.—ABSENCE OF INJURY TO DEFENDANT NO EXCUSE FOR DELAY IN SERVING SUMMONS.—The fact that the delay in the service of summons did not operate to deprive the defendant of any defense which he may have had to the action will not suffice to excuse such delay.

ID.—MERITS OF CASE—WHETHER CONSIDERED ON MOTION TO DISMISS ACTION FOR DELAY IN SERVING SUMMONS.—The dismissal of an action because of unreasonable delay in the service of summons may be made without regard to the merits or demerits of the cause of action; the motion is granted as to a meritorious cause of action as well as to one without merit, because in either case there has been a failure upon the part of the plaintiff to use the diligence which the law requires to make an end of litigation.

ID.—DELAY IN SERVICE OF SUMMONS—RULE THAT LACHES CANNOT BE IMPUTED TO STATE.—The state bank commissioner, in his action to enforce the liability of stockholders of an insolvent bank on behalf of its creditors, is not invested with the sovereignty of the state, and cannot, on motion by a defendant to dismiss the action for delay in serving summons, invoke the rule that laches cannot be imputed to the state.

APPEAL from judgments of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

F. A. Cutler, A. A. De Ligne, and H. W. Johnson, Jr., for Appellant.

J. J. Lermen, C. L. Tilden, and W. F. Postal, for Respondents.

LENNON, P. J.—Pursuant to the provisions of the Bank Act (Stats. 1909, sec. 136, p. 115) this action was instituted by the plaintiff, as state bank commissioner, against the defendants, as stockholders of a banking corporation in liquidation, known as Kimmon Ginko (Golden Gate Bank). Upon motion of the defendant, Swayne & Hoyt Company, the ac-

tion was dismissed upon the ground of unreasonable delay in the service of summons. Judgment was thereupon entered in favor of said defendant. Subsequently the court of its own motion dismissed the action as to all of the defendants on the ground that summons had not been served and returned within three years from the commencement of the action, and thereupon rendered and entered judgment in favor of all of the defendants, including Swayne & Hoyt. The plaintiff has appealed from both judgments. Both appeals purport to have been exclusively taken and perfected under the new or alternative method provided by sections 941a, 941b, and 941c of the Code of Civil Procedure. It is conceded by the plaintiff that both appeals were so taken and perfected, and that the record before us would not support an appeal from either judgment under the old method of appeal. It is further conceded by the plaintiff that in so far as the appeal from the second judgment is concerned the essential requirements of the new or alternative method of appeal were not complied with, and that as a consequence we have not before us under either method of appeal a duly authenticated record of the proceedings had in the lower court upon the rendition and entry of the second judgment. This being so, it is finally conceded—as indeed it must be—that we have no jurisdiction to hear and determine the second appeal, and that the same must be dismissed.

With reference to the appeal from the first judgment, the record shows that the action was commenced by the filing of the plaintiff's complaint on January 5, 1910, and that summons was issued upon the same date, but not served upon the defendant Swayne & Hoyt until the sixteenth day of October, 1912. The motion to dismiss was filed November 7, 1912, and granted January 13, 1913. The defendant did not otherwise or for any other purpose appear in the action. The notice of motion to dismiss expressly declared that the defendant appeared in the action solely and specifically for the purpose of the motion; but even if the notice had been silent in this behalf, the mere making and presentation of the motion was not a general appearance of the defendant in the action which would subject it to the jurisdiction of the court for all of the purposes of the action (Code Civ. Proc., sec. 1014; *Steinbach v. Leese*, 27 Cal. 295; *Powers v. Braly*, 75 Cal. 237, [17 Pac. 197]; *Olcese v. Justice's Court*, 156 Cal. 82, [103

Pac. 317]; *Vrooman v. Li Po Tai*, 113 Cal. 302, [45 Pac. 470]; *Witter v. Phelps*, 163 Cal. 655, [126 Pac. 593].)

The motion to dismiss was supported by the affidavit of R. H. Savage, which, after reciting the institution of the action and the failure of the plaintiff for two years and ten months thereafter to serve the defendant, Swayne & Hoyt, with summons in the action, alleged certain facts and circumstances, which tended to show that the summons could have been served upon the defendant without the slightest difficulty, had the plaintiff so desired, at any and all times after the institution of the action. The averments of the affidavit offered upon behalf of the defendant, and received in evidence in support of the motion to dismiss, were not controverted by the counter affidavit of the plaintiff; and therefore it was an admitted fact upon the hearing of the motion that the plaintiff, if he so desired, could, at all times after the institution of the action, have readily and without difficulty of any kind, have served the defendant with summons in the action.

The power of the court to dismiss upon a showing of undue delay in prosecuting the action is not disputed; and it is conceded that the unexplained and inexcusable failure to serve the summons within two years and ten months from the date of its issuance *prima facie* constituted good and sufficient ground of dismissal. It is insisted, however, that the showing made by the plaintiff justified and excused the delay in the service of the summons; and that therefore the court below abused its discretion in dismissing the action. This contention is rested primarily upon the assumption that the uncontradicted affidavit made upon behalf of the plaintiff in opposition to the motion to dismiss, affirmatively established not only the fact that the delay in the service of summons was unavoidable, but that such delay helped rather than harmed the defendant.

In this connection the affidavit offered and received in evidence upon behalf of the plaintiff recited in substance that the business and assets of the Kimmon Ginko (Golden Gate Bank) were taken possession of by the plaintiff for the purpose of liquidation prior to the institution of the action; that the outstanding credits due the bank were largely unsecured, and due almost wholly from Japanese clients, and consisted of more than one thousand separate accounts; that the complicated condition of the affairs of the bank at the time of

its suspension rendered necessary a thorough investigation, in order to ascertain what amount, if any, would be required from the stockholders to supply the deficiency existing between the liabilities and the assets of the bank; that pending such investigation the action was instituted for the purpose of preventing the statute of limitations from running against the claims of the creditors of the bank and in favor of the defendants as stockholders thereof; that the action could not be fairly and justly pressed against the defendants as stockholders without first ascertaining how much would be realized from the assets of the bank; that the defendant Swayne and Hoyt was in no way injured by the delay in serving the summons, because every defense available at the time the action was instituted was just as available after the summons had been served; that the defendant was benefited by the delay in serving the summons in the particular that the plaintiff was thereby enabled to definitely ascertain the exact amount of the defendant's liability; that because of the large number of stockholders it required much time to locate many of them, and that until all of them could be found and served with summons it was impracticable to press the prosecution of the action.

We are not convinced that the court below would have been justified in finding from the showing of the plaintiff that the delay in the service of the summons inured to the benefit of the defendant. The affidavit made in behalf of the plaintiff in opposition to the motion discloses that the business of the bank was taken over by the plaintiff on July 1, 1909, and that an investigation of its affairs was at once commenced and was still under way at the time of the making of the motion to dismiss. It will thus be seen that for more than three years prior to the motion to dismiss, the plaintiff was engaged in investigating the affairs of the bank; and the affidavit in opposition to the motion contains no averment that such investigation had been completed, or that it would ever be completed. Such investigation, perchance, might have resulted in benefit to the defendant; but the defendant was not required to indefinitely postpone its motion to dismiss, nor could it be denied the advantage of the motion merely because the complicated condition of the bank's affairs prolonged the investigation of the plaintiff; and in the absence of an affirmative showing that such investigation had de-

veloped a definite result favorable to the defendant, we are at a loss to comprehend how it was benefited by the delay.

But even if it be conceded that the allegations of the plaintiff's affidavit show that the investigation instituted by the plaintiff would ultimately have resulted in collecting and conserving the assets of the bank, and that thereby the defendant's liability as a stockholder would be correspondingly reduced, this in effect would be asking to excuse the delay in the service of summons upon the ground that the plaintiff was occupied during the two years and ten months immediately following the institution of the action in endeavoring to procure evidence which would definitely fix the amount of the defendant's liability. The necessity, if any, for such evidence doubtless would have been favorably considered by the lower court and the defendant as a ground for the postponement of the trial of the action after issue joined; but it could not operate to excuse an unreasonable delay in the service of summons. (*Caldwell v. Regents of University of California*, 23 Cal. App. 29, [136 Pac. 731].)

The affidavit interposed upon behalf of the plaintiff, in so far as it related to the claim that the delay in the service of process was unavoidable, because of the multiplicity of defendants, was manifestly deficient in not affirmatively and unequivocally alleging that the plaintiff had in good faith endeavored to serve the several defendants with process. The allegation that "it had taken a great deal of time to ascertain the whereabouts of many of them" is very indefinite and uncertain, and is far from being an allegation that the plaintiff had made any effort to serve any of the several defendants after they had been located. Moreover, whatever difficulty the plaintiff may have encountered in locating any one or more of the defendants was not in and of itself a sufficient excuse for delaying service of process upon a defendant whose whereabouts was at all times known to the plaintiff. We know of no good reason why it was impracticable to press the prosecution of the action "until all of the defendants had been found who could be served with summons." The liability of the defendant as a stockholder of the defunct bank was primary and independent, and in no sense and to no extent dependent or contingent upon the liability of the remaining defendants, and the court below in its discretion might have rendered a several judgment against the de-

fendant Swayne and Hoyt without regard to the liability of the remaining defendants, and regardless of whether or not any or all of the remaining defendants had been served with process. (Code Civ. Proc., secs. 414, 578, 579.)

The fact that the delay in the service of summons did not operate to deprive the defendant Swayne and Hoyt of any defense which it may have had to the action will not suffice to excuse such delay. It cannot be assumed that the defendant did not have a valid defense merely because the action was only to enforce a stockholder's liability. For aught that appears in the showing made by the plaintiff, the delay in the service of summons may have impaired the preparation and presentation of whatever defense the defendant may have had to the action. But aside from these considerations, the dismissal of an action because of unreasonable delay in the service of the summons may be made "without regard to the merits or demerits of the cause of action. The motion is granted as to a meritorious cause of action as well as to one without merit, because in either case there has been a failure upon the part of the plaintiff to use the diligence which the law requires to make an end of litigation." (*Bell v. Solomons*, 162 Cal. 105, [121 Pac. 377].)

In addition to the showing made upon the motion, it is insisted that the action was instituted by the plaintiff upon behalf of the state in its sovereign capacity, and that inasmuch as laches as a matter of law cannot ordinarily be imputed to the state, the motion to dismiss should have been denied for that reason alone. We are not prepared to say that the general rule in this behalf would operate to excuse an unreasonable delay in the service of summons, in an action instituted by the state in its sovereign capacity, for the purpose of asserting a public right or protecting a public interest; but we are satisfied that the present action does not involve in the slightest degree any such capacity, right, or interest. It will be noted that the present action was not instituted in the name of the state; and doubtless this is so because the statute under which the action was instituted neither directs nor contemplates the interposition of the state in its sovereign capacity. The power conferred by the Bank Act on the state banking commissioner to enforce by suit the liability of stockholders in an insolvent bank, involves but an incidental duty of his office, which, when occasion arises,

he must perform solely for the benefit of the creditors of the bank. Obviously in the performance of such duty he must be acting for the benefit of private parties. From the very nature of the action it is apparent that the state has no interest in the subject matter of the litigation in the sense that it has anything to gain or lose in the determination of the action. This being so, it must be held that the plaintiff in bringing the action was not invested with the sovereignty of the state. (*Stern v. State Board of Dental Examiners*, 50 Wash. 100, [96 Pac. 693]; *State v. Halter*, 149 Ind. 292, [47 N. E. 665]; *People v. Jefferds*, 126 Cal. 296, [58 Pac. 704].) It follows that the plaintiff is not immune from the operation and effect of the rule generally applied to ordinary litigants, which requires due diligence in the prosecution of an action.

The conclusion which we have arrived at upon the merits of the action upon which the first judgment is based makes it unnecessary for us to determine the question as to whether or not the court below had jurisdiction to render the second judgment after an appeal from the first judgment had been taken.

For the reasons stated, the first judgment is affirmed, and the appeal from the second judgment is dismissed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 15, 1914.

[Crim. No. 497. First Appellate District.—July 22, 1914.]

THE PEOPLE, Respondent, v. PETER PANAGOIT,
Appellant.

CRIMINAL LAW—PRESENTATION OF FALSE CLAIM TO INSURANCE COMPANY—SUFFICIENCY OF INDICTMENT.—An indictment charging a violation of section 549 of the Penal Code, which makes it a crime to present a false claim of loss to a fire insurance company, is not demurrable because of failure to allege that the presentation of the claim was made to a regularly constituted court of justice.

- ID.—PERSON TO WHOM CLAIM PRESENTED—GIST OF OFFENSE.**—The statute is not confined to claims arising in courts of justice, but includes the presentation to any person who might be cheated or defrauded thereby. The intent to defraud is the gist of the offense; and the design of the legislature was to provide a punishment for the presentation of false fire claims with the intent to defraud, irrespective of the person to whom such claim might be presented.
- ID.—INDICTMENT—FAILURE TO SHOW COUNTY WHEREIN CLAIM WAS PRESENTED.**—The validity of the indictment for such offense cannot be questioned because the testimony taken before the grand jury fails to show that the presentation of the claim was made in the county wherein the indictment was found.
- ID.—SUFFICIENCY OF EVIDENCE BEFORE GRAND JURY—INQUIRY INTO BY COURT.**—Courts cannot, in the absence of a statute permitting it, inquire into the sufficiency of the evidence upon which the grand jury acted, in order to invalidate an indictment returned by it.
- ID.—EVIDENCE—VOLUNTARY STATEMENTS MADE BY DEFENDANT TO ATTORNEYS OF INSURANCE COMPANY.**—In a prosecution for presenting a false claim of loss to a fire insurance company, voluntary statements in regard to his claim, made by the defendant in the office of the attorneys for the insurance company before his arrest and at a time when he understood his inquisitors had no authority to question him, are admissible in evidence.
- ID.—PROTECTION OF WITNESS AGAINST INCRIMINATING TESTIMONY—INTERPRETATION OF SECTION 1324 OF THE PENAL CODE.**—Section 1324 of the Penal Code is in the nature of remedial legislation, and its purpose is to extend protection to witnesses in proceedings other than in the course of criminal prosecutions or other actions, in order that the inquiry for which the tribunals were created may not be impeded or their investigations frustrated through the fear of witnesses that their testimony may incriminate themselves; but it can have no application to an inquiry which is not based or held upon legal authority.
- ID.—PROOF OF CORPORATE CHARACTER OF INSURANCE COMPANY—EFFECT OF GENERAL REPUTATION.**—In a prosecution for presenting a false claim of loss to a fire insurance company, testimony as to the general reputation of the company for doing an insurance business is sufficient to show that it is a corporation.
- ID.—INSTRUCTION AS TO PRESENTATION OF CLAIM—STATEMENT OF EVIDENCE.**—An instruction to the jury that a presentation of a claim was made is not erroneous, where the defendant has admitted such fact.
- ID.—UNFAMILIARITY WITH PREPARATION OF CLAIMS FOR LOSS—EVIDENCE TO REBUT.**—Evidence tending to show that on other occasions and under different names the defendant suffered losses from fire

and prepared proofs of loss, is admissible to rebut his contention that he was unfamiliar with the preparation of such claims.

ID.—EVIDENCE OF OTHER CRIMES—WHEN ADMISSIBLE.—While ordinarily evidence of another offense is not admissible in a criminal prosecution, yet, whenever the case is such that the proof offered in support of the charge tends also to prove the commission of another offense, such proof is admissible; and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion.

ID.—ARGUMENT OF DISTRICT ATTORNEY—REFERENCE TO ARSON—NON-PREJUDICIAL ERROR.—Remarks of the district attorney in his argument to the jury, indicating that the defendant has committed arson, do not justify a reversal of the judgment of conviction, if the evidence establishes his guilt.

ID.—MISCONDUCT OF COUNSEL—NECESSITY OF TIMELY OBJECTION AND EXCEPTION.—It is the duty of counsel for the defendant, when the district attorney indulges in improper remarks during his argument, to call the attention of the court thereto then and there, so that the court may advise the jury to disregard them; it is too late to raise the question for the first time on appeal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. George H. Buck, Judge presiding.

The facts are stated in the opinion of the court.

Henry B. Lister, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

KERRIGAN, J.—The defendant herein was convicted of fraudulently presenting a false claim of loss by fire to the Liverpool, London and Globe Insurance Company; and this appeal is taken from the judgment of conviction and from the order denying defendant's motion for a new trial.

The indictment charged defendant, together with G. A. Levy and C. G. Patric, with violating the provisions of section 549 of the Penal Code of this state, and recited that, on the 17th day of December, 1912, G. A. Levy obtained and procured a contract of insurance against loss by fire to the amount of three thousand dollars, in said insurance company, on a stock of merchandise, household furniture, and other personal property contained in a store and dwelling situated in Albany,

county of Alameda; that, on the twenty-sixth day of December, 1912, the said Levy sold the property so insured to the defendant, and assigned and delivered to him the contract of insurance; that, shortly thereafter and on the twenty-eighth day of December, 1912, a fire occurred at the said premises and the property so insured was destroyed.

The indictment further alleged that at the time of its destruction as aforesaid, the property so insured did not exceed in value the sum of one thousand five hundred dollars, and that the defendant well knew this; and that, notwithstanding such fact, and desiring and intending to cheat the said insurance company out of the sum of money exceeding the actual value of the insured property, defendants willfully and unlawfully presented a false and fraudulent claim of loss in the sum of three thousand dollars, knowing at the time that the value of the property did not exceed the sum of one thousand five hundred dollars.

Defendant Panagoit demanded severance, and was separately tried, convicted, and sentenced to eighteen months' imprisonment in San Quentin.

Upon his arraignment, defendant demurred to the indictment, claiming that the facts stated in the indictment did not constitute a public offense, and later the same question was raised on motion in arrest of judgment.

It is argued by defendant in support of these contentions that, by reason of the fact that the statute is silent as to the person to whom a presentation of loss should be made in order to constitute the offense, the statute is incomplete, and can only be given the interpretation that the presentation is to be made in a regularly constituted court of justice.

The section reads as follows:

"Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, or who prepares, makes, or subscribes any account, certificate of survey, affidavit, or proof of loss, or other book, paper, or writing with intent to present or use the same, or allow it to be presented or used in support of any such claim, is punishable by imprisonment in the state prison not exceeding three years, or by a fine not exceeding one thousand dollars, or by both."

While it is true, as claimed by defendant, that the statute does not expressly designate to what person or persons the presentation should be made, nevertheless it is not meaningless or incomplete for that reason.

Respondent argues, and justly so, that the statute broadly includes any and every person, firm, or corporation who may or might be liable under a contract of insurance for the payment of the claim, and that the statute is not confined to claims arising in courts of justice, but includes the presentation to any person or persons or any agent of person or persons who might be cheated or defrauded thereby. The intent to defraud is the gist of the offense; and the design of the legislature was clearly to provide a punishment for the presentation of false fire claims with intent to defraud, irrespective of the person to whom such claim should be presented.

Defendant further contends that the testimony taken before a grand jury was insufficient to support an indictment, for the reason that in no part of the evidence was it shown or testified to, that the presentation of the false claim to the insurance company or to any other person, was made in the city and county of San Francisco; and for that reason there is nothing to confer jurisdiction upon the superior court of Alameda County. This contention cannot be maintained. There is no provision in our law for thus reviewing the action of a grand jury in finding an indictment. The validity of an indictment cannot be attacked upon the mere ground of insufficiency of evidence to support it. Courts cannot, in the absence of a statute permitting it, inquire into the sufficiency of the evidence upon which the grand jury acted, in order to invalidate an indictment returned by them. (*In re Kennedy*, 144 Cal. 634, [103 Am. St. Rep. 117, 67 L. R. A. 406, 78 Pac. 34].) The indictment cannot be assailed on this ground. (*Brobeck v. Superior Court*, 152 Cal. 289, [92 Pac. 646].)

It is also claimed that there was no evidence introduced at the trial to prove this fact.

An examination of the record does not sustain this claim. The adjuster for the insurance company testified that, after the defendant had made out the proof of loss upon the blank furnished him by such adjuster, the defendant gave it to the company. He further testified that defendant had informed

him that he had so done, and that the company had subsequently sent it to him. Besides this the defendant himself testified that he took it to the company after he had presented it. From all the evidence upon the subject, it sufficiently appears that defendant presented the proof of loss to the company at its office, which was situated at Leidesdorff and California streets, in the city and county of San Francisco.

Another ground urged for reversal is that a certain so-called deposition was introduced in evidence before the grand jury, which contained nothing to show that the defendant was instructed as to his rights as required by section 1324 of the Penal Code, and that, for this reason, he should be exempted from prosecution.

This so-called deposition consisted of certain voluntary statements made by defendant in the law offices of Goodfellow, Eells & Orrick, attorneys for the insurance company, concerning his claim, which statements were taken down in shorthand by a shorthand reporter, but the examination was not authorized, nor was it ever completed, the defendant having left the state during its progress; and his arrest upon this charge shortly followed.

The Penal Code (sec. 1324) provides in substance that any person offending against any of the provisions of that code or against any law of this state is a competent witness against any other person so offending, and may be compelled to testify upon any trial, hearing, proceeding, or lawful investigation or judicial proceeding in the same manner as any other person, and if such witness demands that he be excused on the ground that his testimony will incriminate himself, he shall not be excused from testifying but shall not thereafter be liable to prosecution based upon such testimony. The section further provides that its protecting parts shall not apply, where the privilege is not claimed, but such privilege is deemed to have been claimed unless the judge, foreman, or other person reads distinctly this section of the code to the witness. The section was passed by the legislature in 1911. Prior to its enactment our supreme court, in the case of *People v. Weiger*, 100 Cal. 352, [34 Pac. 826], decided that voluntary admissions made by a witness in a criminal action when he is not in custody and has not been charged with a criminal offense, are competent evidence against him in a criminal prosecution subsequently inaugurated against him. In *Com-*

monwealth v. Bradford, 126 Mass. 42, it is held that on the trial of an indictment the voluntary testimony of a defendant before a fire inquest, reduced to writing and signed, and at a time when no criminal prosecution was pending against the defendant, was admissible against him.

The section of the Penal Code last referred to is in the nature of remedial legislation, and its purpose was undoubtedly to extend protection to witnesses in proceedings other than in the course of criminal prosecutions or other actions, in order that the inquiry for which the tribunals were created might not be impeded or their investigations frustrated through the fear of witnesses that their testimony might incriminate themselves; but it certainly can have no application to an inquiry which is not based or held upon legal authority, such as the one under consideration. The witness was not obliged to answer, and he understood that he could not be compelled so to do, for he refused to answer many of the questions put to him, giving as his reasons for such refusal that his inquisitors had no authority to question him. His statements given in support of his claim were therefore voluntary, and admissible against him. Besides this the instrument appears to have been admitted in evidence in the trial under stipulation.

The further claim that there is no proof that the insurance company to whom the false claim was made was a corporation is without merit. The witness Eitel testified as to the general reputation of the corporation for doing an insurance business, which is sufficient. (10 Cyc. 241; 7 Am. & Eng. Ency. of Law, p. 661.)

Defendant also complains of the action of the court in instructing the jury that a presentation had been made, but this fact the defendant himself admitted. This was a mere statement of the evidence, and is not erroneous. (*People v. Christensen*, 85 Cal. 569, [24 Pac. 888]; *People v. Casey*, 65 Cal. 260, [3 Pac. 874].)

Finally, objection is made to the alleged misconduct of the district attorney in referring to the crime of arson in his argument; and to the allowance of questions during the trial tending to show that the fire which destroyed the insured property was of incendiary origin. In attempting to rebut the claim of the defendant that he was unfamiliar with the preparation of claims of loss, the district attorney did offer evi-

dence to show that, on other occasions and under other different names, defendant had suffered losses by fire, and that, on those occasions, he had prepared proofs of loss. The court in admitting the evidence instructed the jury to dismiss from their minds all evidence of former fires claimed to have been had by the defendant; and stated that such evidence was confined to and was admitted for the sole purpose of rebutting defendant's testimony as to his lack of knowledge in the preparation of a fire claim. While ordinarily evidence of another offense cannot be given in evidence, yet, whenever the case is such that the proof offered in support of the charge tends also to prove the commission of another offense, such proof is admissible; and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion. (*People v. Ebanks*, 117 Cal. 652, [40 L. R. A. 269, 49 Pac. 1049].)

Assuming that the remarks of the district attorney in his argument would indicate that the defendant had committed the crime of arson, the question then arises whether such error is sufficient to justify a reversal of the judgment. It was the duty of the counsel for the defendant to call the attention of the court to improper remarks then and there, so that the court might have advised the jury to disregard them. It is too late to raise such question for the first time on appeal. (*People v. Kramer*, 117 Cal. 647, [49 Pac. 842]; *People v. Ruef*, 14 Cal. App. 576-619, [114 Pac. 48, 54].) The record shows no such objection. Counsel for the defendant insists that the objection was made, but the record does not support him in this assertion, and we are bound by it. Moreover, under section 4½ of article VI of the constitution it would be our duty to affirm the judgment of conviction. The evidence shows beyond all question that the defendant and Patric conspired to defraud the insurance company by presenting a false claim of loss. Patric and Levy were one and the same person. Upon the loss of the property Patric solicited and procured from some of the firms where he had purchased merchandise bills representing purchases greatly in excess of the actual deliveries. These, with other bills which falsely represented merchandise purchased of certain firms, where none had been purchased, were used and formed the basis of the claim filed by defendant, who testified that he had seen all this property, which had no existence, go into the premises.

These, and other facts disclosed upon a review of the entire record, including the evidence, so far from showing that there has been a miscarriage of justice, tend strongly to prove the guilt of the defendant and that no other verdict could have been reached if the alleged error had not been committed.

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

[Civ. No. 1347. First Appellate District.—July 23, 1914.]

**J. H. JORDAN, Respondent, v. W. S. KINGSBURY, as
Surveyor-General and Register of the State Land Office,
Appellant.**

**STATE LAND—RESURVEY OF THIRTY-SIXTH SECTION SO AS TO CHANGE
ORIGINAL BOUNDARIES.**—Where on an official resurvey of the thirty-sixth section of a township the boundaries are changed so as to include land not embraced by the lines of the section as originally surveyed, the land thus included becomes a part of the school lands of the state and open to purchase under its laws.

**ID.—BOUNDARIES BETWEEN STATE AND FEDERAL LANDS—CONFUSION IN
AS GROUND FOR REFUSAL OF MANDAMUS.**—A writ of mandate to compel the surveyor-general to approve an application to purchase such land will not be denied on the ground that the granting of the writ will create confusion between the state and federal governments as to the boundaries of their respective lands.

**ID.—APPLICATION TO PURCHASE—ACTS OF SURVEYOR-GENERAL MINIS-
TERIAL—MANDAMUS.**—The power of the surveyor-general, upon an application to purchase state lands, is neither judicial nor unlimited, under section 3498 of the Political Code, but merely ministerial, and he is subject to the compulsion of a writ of mandate.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, and Malcolm C. Glenn,
Deputy Attorney-General, for Appellant.

B. M. Atkins, for Respondent.

RICHARDS, J.—This is a proceeding wherein the plaintiff sought and obtained in the trial court a peremptory writ of mandate, requiring the defendant, as surveyor general of California and register of the state land-office to approve the plaintiff's application to purchase from the state those certain lands described in his petition. From a judgment to that effect the surveyor general appeals.

The facts of the case are practically undisputed and are quite fully and clearly set forth in the brief of appellant. In the year 1869, an official survey was made by authority of the United States government of those sixteenth and thirty-sixth sections of the public lands which had been granted by the government to the state of California for school purposes, under the act of Congress of March 3, 1853. [10 Stats. 244, a. 145]. Between the year 1869 and the year 1893, the state of California had sold and issued patents for all of the lands embraced within the said section 36, in which the lands sought to be purchased by plaintiff are now claimed to be. In the year 1893, the United States government ordered another official survey to be made of the public lands within that region. By this later, and probably more accurate, survey, the boundary lines of said section 36 were shifted southward and also slightly eastward, so as to embrace a considerable tract of land on the southward side and a narrow strip on the eastward side not theretofore included within the older section lines. The tract of land now sought to be purchased by the plaintiff lies within these newer boundaries but outside of the lands originally surveyed. The application of the plaintiff to purchase these lands was disapproved and denied by the surveyor general, upon the chief ground, as expressed in his decision disapproving the same, that the lands sought to be purchased belonged to the United States and not to the state. In opposing the application for the writ of mandate, the defendant urged two additional reasons why it should be denied. These were: 1. That the decision of the surveyor general is final upon an application to purchase state lands, and hence is not reviewable by the courts; and 2. That the granting of the writ of mandate would lead to great confusion between the state and federal governments as to the boundaries of state and federal lands. It is conceded by the surveyor general that the application of the plaintiff to purchase

these lands was otherwise regular in form and substance, and that he was and is a qualified person to purchase the same.

It will thus be seen that the first question for determination is the question as to whether, for the purposes of this proceeding, these lands are to be regarded as state lands, lying within the official boundaries of the said thirty-sixth section, and therefore open to purchase by the plaintiff. We think this question must be answered in the affirmative, upon the authority of the cases of *Cragin v. Powell*, 128 U. S. 691, 698, [32 L. Ed. 566, 9 Sup. Ct. Rep. 203]; *Hardin v. Jordan*, 140 U. S. 371, [35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838]; *Knight v. United States Land Association*, 142 U. S. 161, [35 L. Ed. 974, 12 Sup. Ct. Rep. 258]; *Gleason v. White*, 199 U. S. 54, 60, [50 L. Ed. 87, 25 Sup. Ct. Rep. 782]. If, therefore, under these authorities the effect of the second official survey of these lands was to include them within the scope of the act of Congress of March 3, 1853, and transfer them to the state as a part of its school lands, it follows that the action and decision of the surveyor general in disapproving the application of the plaintiff to purchase these lands was erroneous. The surveyor general, however, contends that under the authority invested in him by section 3498 of the Political Code, his decision in the matter was final, and hence not the subject of review by the courts upon this form of writ. The section of the Political Code upon which he bases this contention reads as follows:

"If it shall appear to the surveyor general that the application is made in good faith, and that all of the facts stated in the application are true, and that the land applied for is subject to sale, he shall approve the application, otherwise he shall disapprove the same." (Pol. Code, sec. 3498.)

The simple reading of this section shows that the power of the surveyor general is neither as judicial nor as unlimited as he claims it to be. The three conditions upon which the section expressly states he shall act in his approval or disapproval of the application were all met by the plaintiff; his application was admittedly made in good faith; and all the facts stated therein were true; and, as we have seen, the lands applied for were, for the purposes of said application at least, lands of the state, under their last official survey. These things being true, the section of the code in question expressly says that the surveyor general "shall approve the applica-

tion." It is quite clear that this language leaves that official no discretion in the premises, and renders his act merely a ministerial one, and as such subject to the compulsions of a writ of mandate. The case of *Middleton v. Low*, 30 Cal. 596, is in point upon this question, and the industry of counsel for appellant has not produced any later case overruling that early decision.

The appellant's final contention that the writ of mandate ought not to issue because of its effect in creating confusion between the state and federal authorities regarding the boundaries of their respective lands is without merit. The clear right of a citizen of the state to acquire public lands open to purchase, in the manner provided by law, must be enforceable by an appropriate proceeding, regardless of such consequences as appellant forecasts. Even if his fears are well grounded, the law has doubtless provided proper remedies for such confusion as might arise without the need of denying this plaintiff the present right to which he is clearly entitled.

The judgment and order denying defendant's motion for a new trial are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1352. First Appellate District.—July 24, 1914.]

EDWARD J. HANSON, Plaintiff and Respondent, v.
MORRIS SHERMAN et al., Defendants; F. PAUSON, Defendant and Appellant.

CORPORATIONS—ACTION TO ENFORCE STOCKHOLDERS' LIABILITY—SUFFICIENCY OF COMPLAINT.—In an action to enforce the liability of a stockholder in a corporation, an allegation in the complaint that at the time the indebtedness was incurred "there were subscribed, issued and outstanding nine thousand five hundred and eighty-eight shares, and no more, of the capital stock" of the corporation, constitutes a sufficient statement, in the absence of a special demurrer, of the total amount of the capital stock that was subscribed for at the time the obligation in suit was incurred.

Id.—SPECIAL DEMURRER—EFFECT OF OVERRULING WITH CONSENT OF DEFENDANT.—The overruling, with the express consent of the defendant, of a special demurrer to such complaint, is tantamount

to a withdrawal of the demurrer, in so far as it was grounded upon the ambiguities and uncertainties of the complaint.

ID.—EVIDENCE AS TO WHETHER DEFENDANT IS STOCKHOLDER—CONCLUSION OF WITNESS.—Where, on the issue in such case whether the defendant was a stockholder, the vice-president of the corporation is asked to state under what circumstances the stock in question was issued to the defendant, his answer that the stock "was issued by the corporation to Mr. F., trustee, for Mr. P., as a bonus for a loan of \$25,000, which he had made to the M. Company," is properly stricken out as not responsive and as the conclusion of the witness.

ID.—CIRCUMSTANCES CONTROLLING ISSUANCE OF STOCK—ADMISSIBILITY IN EVIDENCE.—Upon the issue of whether or not the defendant was a stockholder in the corporation, evidence of the circumstances covering and controlling the issuance of the stock to him is competent, relevant, and material, provided it is accompanied with or followed by other evidence showing or tending to show that the circumstances of the transaction had been communicated to the defendant.

ID.—MAILING LIST OF NAMES OF STOCKHOLDERS—ADMISSIBILITY TO SHOW WHO ARE STOCKHOLDERS.—A list of names written upon the fly-leaf of the corporation's stock journal, as the persons to whom notices of stockholders' meetings were sent, is not admissible to show that the defendant was a stockholder, where the same is not followed by any evidence showing that notices had been sent to him.

ID.—ENTRY IN CORPORATION BOOKS AS EVIDENCE OF WHO ARE STOCKHOLDERS.—The entry of the defendant's name in such list did not constitute an entry of his name in the books of the corporation as a stockholder, within the meaning of section 322 of the Civil Code, so as to be *prima facie* evidence that he was the owner of stock in the corporation.

ID.—ASSERTION THAT PERSON IS STOCKHOLDER—WHETHER EVIDENCE OF SUCH FACT.—An assertion that the defendant was a stockholder in the corporation, made to him at a meeting of stockholders and creditors, is not evidence against him that he was a stockholder, unless the truth of the charge was admitted by him, either by his express answer, or his acquiescence indicated by his silence, or by acts and conduct which could be fairly construed as an assent.

ID.—ULTRA VIRES ISSUE OF STOCK AS PLEDGE—WHETHER CONSTITUTES PLEDGEE A STOCKHOLDER.—The *ultra vires* issuance of stock by a corporation as a pledge for the repayment of a loan does not have the effect of transforming the person receiving the same from a pledgee to a stockholder liable for the corporate debts.

ID.—WITNESS—CONCLUSION CONCERNING EFFECT OF TRANSACTION.—A witness may not testify as to his conclusions concerning the effect of a transaction, even where the facts themselves are disclosed.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. B. V. Sargent, Judge presiding.

The facts are stated in the opinion of the court.

A. L. Weil, for Appellant.

Vogelsang & Brown, for Respondent.

LENNON, P. J.—This is an appeal by the defendant, Frank Pauson, from a judgment entered against him in the sum of \$790.50, and from an order denying him a new trial, in an action instituted to determine and enforce his liability as a stockholder for the indebtedness of the Monadnock Brick Company, Incorporated.

The plaintiff's complaint proceeded upon the theory that the defendant, Pauson, was a stockholder in the corporation at a time when the corporation had made and delivered its two certain promissory notes in the aggregate sum of eleven thousand five hundred dollars to the City and County Bank, plaintiff's assignor.

The complaint alleged the nonpayment of these notes, and in effect prayed for a judgment against the defendant, as a stockholder of the corporation, for his proportionate share of the unpaid principal and interest due on said notes. The defendant in his answer denied that he was a stockholder in the corporation. The issue thus raised ultimately became the paramount question upon the trial of the case.

It was an admitted fact in the case that prior to the execution and delivery of the corporation's notes to plaintiff's assignor, the corporation, in consideration of a loan of twenty-five thousand dollars, had executed its promissory note in that amount, indorsed by its three directors, to the defendant, and at the same time issued and delivered to him a certificate for five hundred shares of the corporate capital stock in the name of the corporation's then secretary, A. Fieste, as trustee.

The action was defended upon the theory that the defendant had merely received the stock in question as security for the payment of the loan made by him to the corporation. The plaintiff, on the other hand, contended and attempted to show that the stock was issued, delivered, and accepted as

a bonus for the making of the loan, and that the defendant thereby became a stockholder of the corporation.

The trial court found as a fact from the evidence adduced upon the whole case that at the time the corporate indebtedness in suit was incurred, defendant was the equitable owner of five hundred shares of the corporation's stock, which stood upon its books in the name of A. Fieste as trustee, and deduced the conclusion of law therefrom, that the defendant was liable as a stockholder for his proportionate share of the indebtedness of the corporation.

At the outset it is contended that the plaintiff's complaint does not state facts sufficient to constitute a cause of action. This contention is based upon the assumption that the complaint does not allege the total number of shares of stock of the Monadnock Brick Company which were subscribed at the time the obligation to plaintiff's assignor was incurred. In this behalf the allegation of the complaint is "that at the time said sum was loaned by said City and County Bank to said Monadnock Brick Company and the aforesaid promissory notes executed therefor, there were subscribed, issued and outstanding nine thousand five hundred and eighty-eight shares, and no more, of the capital stock of said Monadnock Brick Company." The ambiguity and uncertainty, if any, existing in this allegation could have been corrected by the interposition of a special demurrer. Such a demurrer was in fact interposed. The demurrer, however, was overruled with the express consent of the defendant. This was tantamount to a withdrawal of the demurrer, in so far as it was grounded upon the ambiguities and uncertainties of the complaint. (*Evans v. Gerken*, 105 Cal. 311, [38 Pac. 725].)

This left the complaint standing as if no special demurrer had been interposed, and in the absence of such a demurrer, we are satisfied that the complaint contained a sufficient statement of the total amount of the capital stock of the corporation that was subscribed for at the time the obligation in suit was incurred. (*Bashore v. Parker*, 146 Cal. 525, [80 Pac. 707]; *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, [139 Am. St. Rep. 120, 110 Pac. 942].) The allegation of the complaint in this behalf was not denied by the answer of the defendant; therefore the total number of shares subscribed in the corporation at the time the indebtedness in suit was incurred, was, as pleaded in the plaintiff's complaint, an ad-

mitted fact in the case. Consequently no evidence was necessary to sustain the finding of the trial court upon this phase of the case.

F. H. Hilbert, vice-president of the Monadnock Brick Company, was a witness for the plaintiff. During the course of his direct examination, he was asked to state the circumstances under which the stock in question was issued to the defendant. Objection was made to the question in effect upon the ground that evidence of the circumstances concerning and controlling the issuance of the stock was incompetent unless such circumstances were shown to have been communicated to the defendant. The objection was overruled and the witness allowed to answer that the stock "was issued by the corporation to Mr. Fierte, trustee, for Mr. Pauson, as a bonus for a loan of \$25,000, which he had made to the Monadnock Brick Company." A motion to strike out the answer upon the ground stated in the objection and upon the further ground that the answer stated merely the conclusion of the witness was denied.

Upon the issue of whether or not the defendant was a stockholder in the corporation, evidence of the circumstances covering and controlling the issuance of the stock to him was competent, relevant, and material, provided such evidence was accompanied with or followed by other evidence showing or tending to show that the circumstances of the transaction had been communicated to the defendant. (Jones on Evidence, sec. 517.)

The trial court apparently overruled the objection upon the assumption that the defendant's knowledge of the circumstances under which the stock was issued would be subsequently shown by other evidence. If this be so, the objection as made was rightly overruled for the time being, and if the witness had answered the question propounded to him, and his testimony had been followed by competent evidence that the circumstances of the transaction had been communicated to the defendant, no fault could be finally found with the ruling of the trial court. The question as propounded, however, was not answered by the witness. His answer cannot be construed to be even an attempt to narrate the circumstances under which the stock in question was issued to the defendant. At its best, his answer embodied no more than his mere conclusion as to the result of some undisclosed action which may have been taken by the officers of the corporation con-

cerning the issuance of the stock in question. A witness may not testify as to his conclusions concerning the effect of the transaction, even where the facts themselves are disclosed; and surely he should not be permitted to give in evidence his conclusions, adduced from undisclosed facts and circumstances. The legal effect of the issuance of the stock to the defendant was the paramount point in controversy in the present case, and this was a question which should have been decided by the trial court upon a consideration of the facts of the transaction, whatever they may have been, unaided and uninfluenced by the conclusion of the witness. The motion to strike out the answer complained of should have been granted.

Further along in the testimony of the witness Hilbert, it appeared that a list of names with the heading, "Notice sent to the following," was written upon the fly-leaf of the corporation's stock journal. This list of names was offered in evidence upon behalf of the plaintiff, whereupon objection was made upon the ground that it was incompetent, irrelevant, and immaterial, that it was not shown that the list of names was made and issued in the regular course of the business of the corporation, and that it did not appear "that the defendant . . . was cognizant of the fact that his name appears there, and it was an attempt to bind him by something not done in his presence." In response to a question from the court as to the purpose of offering the list in evidence, counsel for the plaintiff stated, "I am going to follow it up by showing that Mr. Pauson was on the list; (that) he was the party to whom notice was to be given; that the secretary always did send out notices to attend stockholders' meetings to him. I want to show he was a stockholder." The objection was overruled, and the list, which included the name of the defendant, was received in evidence, presumably for the purpose stated. The question as to whether or not such list was admissible in evidence as a foundation for proof of the further fact that notices to stockholders were usually sent to the parties, including the defendant, whose names appeared thereon, is of no consequence, and need not be decided, in view of the fact that the admission of the list in evidence was not followed by any evidence showing that such notices had been sent to the defendant. The only evidence upon this point is to be found in the testimony of the witness Hilbert, which was to the effect that he knew that the bookkeeper of the corpora-

tion had been instructed to send notices of the corporation's affairs to the parties whose names appeared upon the list, but he did not know of his own knowledge that such instructions had in fact been complied with. If the name of the defendant had been entered on the stock-book of the corporation as a stockholder, such entry would have been *prima facie* evidence that he was the owner of stock in the corporation. (Civ. Code, sec. 322 et seq.) And if such proof had been made, then in this action to enforce his liability as a stockholder, the burden of proving that he was not a stockholder would have been upon him. (Jones on Evidence, sec. 517.) But it is an admitted fact in the case that the defendant's name was not entered as a stockholder upon the books of the corporation; and while the preliminary proof received in support of the offer of the list in evidence may have been sufficient to show that it was prepared by the bookkeeper of the corporation for the purpose of forwarding notices to real or supposed stockholders, nevertheless such list cannot be construed and considered as an entry in the books of the corporation within the meaning of section 322 of the Civil Code; and therefore such list in and of itself did not constitute any evidence of the fact that the defendant was a stockholder in the corporation. It follows that the ruling of the trial court was erroneous in so far as the list in question was received in evidence for the purpose of showing that the defendant was a stockholder.

In addition to the evidence erroneously admitted under the rulings previously noted, plaintiff attempted to show that the defendant was present at a stockholders' meeting of the corporation, that he made no reply when asked by a creditor of the corporation "to advance money to the corporation because . . . he was a stockholder—or something to that effect."

If the defendant had attended this meeting as a real or ostensible stockholder, and while there had failed to deny the assertion that he was a stockholder, this doubtless would have been some evidence tending to show that he had received and accepted the stock in controversy as a bonus, and not, as he testified, as collateral security for the payment of the corporation's notes to him. But the evidence falls far short of showing any such situation. In the first place, as the evidence shows, the meeting referred to was not composed exclusively of stockholders—to the contrary, it shows that the creditors

of the corporation were invited to be present "in order to see what they could do to straighten out" the affairs of the corporation, and in response to that invitation, many of the creditors attended the meeting. The defendant was present at the meeting. Admittedly he was a creditor of the corporation; and the evidence does not show that he attended the meeting in any other capacity. Consequently it cannot be said that the plaintiff's evidence affirmatively shows that the defendant attended the meeting as a real or ostensible stockholder, and his presence in any other capacity will not weigh as evidence against him. The charge that the defendant was a stockholder in the corporation was not evidence against the defendant unless the truth of the charge was admitted by the defendant either by his express answer, or his acquiescence as indicated by his silence, or by acts and conduct on his part which could be fairly construed as an assent.

While the testimony of two witnesses for the plaintiff is positive upon the point that at the meeting referred to one of the creditors in effect charged the defendant with being a stockholder, yet neither witness testified that the defendant remained silent under the charge. One witness was unable to recall the defendant's reply, and the other refused to say that he made no answer. On the other hand, the defendant as a witness in his own behalf, while admitting that he was in effect charged by a creditor of the corporation with being a stockholder, testified, "I told him positively that I did not own a share of stock in the company." Clearly the evidence upon this phase of the case failed to show that the defendant by acquiescence or otherwise admitted the truth of the charge that he was a stockholder in the corporation. Incidentally it is contended that the corporation could not legally issue its stock as a pledge for the repayment of a loan, and from this it is argued that it must be presumed as a matter of law, that the stock in question was issued and accepted in pursuance of a lawful purpose, and the benefit, as evidence, of the asserted presumption is claimed in aid of the finding of the trial court.

Ordinarily, of course, the issuance and acceptance of corporate stock, regular upon its face, carries with it a presumption that such stock was issued for a lawful purpose, but we apprehend that no such presumption prevails in the presence of proof to the contrary; and conceding without deciding that

the issuance of the stock in question as a pledge was an act *ultra vires*, such issue would be a nullity, and certainly would not have the effect of transforming the defendant from a pledgee into a stockholder.

The testimony concerning defendant's presence at the meeting of the stockholders, and the charge made there that he was a stockholder, coupled with the testimony hereinbefore referred to in the discussion of the rulings of the trial court, constitutes practically all of the evidence upon which the plaintiff relied at the trial to show that the defendant was a stockholder of the corporation. The evidence adduced upon behalf of the defendant did not develop anything in aid of the plaintiff's case, or which tended in any degree to support the finding in question; and if, as previously indicated, the testimony as to what transpired at the stockholders' meeting did not constitute any evidence against the defendant, it follows that the finding of the trial court that he was the equitable owner of the stock in question is supported only by the evidence which was erroneously admitted. This being so, it is obvious that such finding is not supported by any competent evidence.

For the reasons stated, the judgment and order appealed from are reversed and the cause remanded for a new trial.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 1402. Second Appellate District.—July 24, 1914.]

BONNIE ELOUISE McNUTT, as Executrix of the Will of
Cyrus F. McNutt, Deceased, et al., Appellants, v. ANTON
PABST et al., Respondents.

ATTORNEY AND CLIENT—ACTION BY ATTORNEY TO RECOVER FEES—
REASONABLE VALUE OF SERVICES—VALUE OF PROPERTY INVOLVED.—

In an action by an attorney to recover for legal services rendered in defending actions to quiet title to land, a consideration of the value of the property involved in the actions furnishes only one of the factors to be taken in view by the jury in arriving at a verdict as to the reasonable value of the services, and notwithstanding any opinion expressed by the witnesses, the jury have the right to form

their own judgment as to that value, taking into consideration the location and conditions surrounding the land as shown by the evidence.

ID.—CONFLICTING EVIDENCE—REVIEW ON APPEAL.—If in such case the record on appeal discloses some substantial evidence both ways upon the question of the value of the land, the appellate court cannot substitute its judgment for that already declared by the jury.

ID.—EXPERT TESTIMONY AS TO VALUE OF LEGAL SERVICE—EXAMINATION OF WITNESSES.—It is not error to allow attorneys, called as witnesses in such case, to state the reasonable value of the services rendered, assuming that the land is worth comparatively only a small amount per acre, since such testimony tends to illustrate just what weight the matter of the value of the property has with the witnesses in their conclusions.

ID.—RECORD ON APPEAL—ABSENCE OF INSTRUCTIONS IN TRANSCRIPT—PRESUMPTIONS.—If the instructions given by the trial court to the jury are not set out in the transcript, it may be assumed on appeal that those instructions correctly stated the law, and that if the effect of any of the evidence should have been limited by the instructions, then such instructions were declared to the jury.

ID.—DILIGENCE OF ATTORNEY IN PERFORMING LEGAL SERVICE—EVIDENCE. In an action by an attorney to recover for services rendered in defending actions to quiet title it is proper to exclude testimony that the plaintiff did everything that he thought necessary or proper to do in such actions, where all the facts as to what was done before and at the trial of the actions are shown by the evidence.

ID.—SEPARATE VERDICTS—DIRECTION OF COURT TO RETURN SINGLE VERDICT.—If in such case the jury returns two verdicts, one in favor of the plaintiff, and the other for a smaller sum in favor of the defendant based on damage to him because of the plaintiff's negligence, the court may properly direct the jury to return to the jury room and return a single verdict for the difference.

APPEAL from an order of the Superior Court of Los Angeles County refusing a new trial. Franklin J. Cole, Judge presiding.

The facts are stated in the opinion of the court.

Ben Goodrich, for Appellants.

Geo. L. Keefer, for Respondents.

JAMES, J.—In the year 1909 Cyrus F. McNutt, Joseph E. Hannon, and Benjamin Balmer, as attorneys at law, were employed by respondents to defend in two actions

then pending in the superior court in the county of Los Angeles, in each of which respondents appeared as parties defendant. Cyrus F. McNutt has since died, and his executrix has been substituted herein in his stead. The actions first referred to concerned the question as to the title to a certain lot of land, comprising about eight acres. Pursuant to their employment the attorneys for respondents prepared their defense to the first action, which necessitated a lengthy examination of the records in the county recorder's office, and that action was finally tried, the trial occupying some three days. The city of Los Angeles was also a party defendant, and a disclaimer was first filed on its account, but later, upon application made in that behalf, the court allowed the said city to file an answer by which it set up title in itself to the land in question. This answer was filed on January 14, 1910, and in May following the plaintiff therein dismissed the action as to the city of Los Angeles. The findings and decree of the court as finally entered were in favor of the respondent Anton Pabst, it being determined that he held, as against the plaintiff there suing, good title to the land then in controversy. No contract had been made between respondents and their attorneys as to payment of any specific sum on account of fees for services rendered by the attorneys in either of the actions to quiet title, and after the first cause had been tried and determined a dispute arose between respondents and their counsel as to what amount it would be proper for the former to pay. The attorneys claimed that the sum of about one thousand seven hundred and fifty dollars had been earned by them, and respondents objected to paying more than five hundred dollars. Thereupon the attorneys refused to proceed any further as counsel for respondents in the second action, and brought this suit to recover the sum of one thousand seven hundred and twenty dollars as for services rendered in the first suit and two hundred and fifty dollars for services in the second action. The defendants took issue as to the value of the services and by cross-complaint made a claim for damages by reason of alleged negligent handling of the suit which was tried and in which respondent Anton Pabst was the successful party. The jury returned a verdict in favor of appellants for the sum of one hundred and seventy-five dollars, and judgment being entered thereon, appellants made

their motion for a new trial and appealed from the order denying the same.

Considerable testimony was introduced at the trial touching the value of the land which was the subject of the actions heretofore referred to, this evidence being offered as a basis for the fixing of a reasonable sum to be allowed as compensation to counsel. The testimony in this behalf varied greatly, some witnesses fixing the value of the eight acres as low as two hundred dollars per acre and others fixing as high a figure as two thousand dollars per acre. It is contended on behalf of appellants that the evidence preponderated in their favor upon the question as to the land being worth approximately two thousand dollars per acre. It is not in terms urged that the "preponderance" of the evidence rested in that direction, but such must be the effect to be given to the claim made upon that matter. This contention must be dismissed with but brief comment, for the record discloses that there was some substantial evidence both ways upon the question of the value of the land, and that being true, this court cannot substitute its judgment for that already declared by the jury. Moreover, a consideration of the value of the property affected in the actions referred to only furnishes one of the factors to be taken in view by the jury in arriving at a verdict as to the reasonable value of the services rendered by the attorneys; and notwithstanding any opinion expressed by the witnesses, the jury had the right to form its own judgment as to that value, taking into consideration the location and conditions surrounding the land, all of which were described in the evidence.

It is complained that the court erred in allowing questions to be asked of certain attorneys who were called as witnesses and of some of the parties plaintiff, which required the witnesses to fix the amount of reasonable attorneys' fees assuming that the land was worth only from fifty dollars to two hundred dollars per acre. Whether there was sufficient evidence to warrant this assumption as to values is not material, because as a matter of cross-examination the questions were proper as tending to illustrate just what weight the matter of the value of the land had with the witnesses in leading them to conclusions expressed as to the worth of the legal services rendered. It may be here suggested that in the transcript there is not set out the instructions given by the

trial court to the jury, and it may be therefore assumed that those instructions correctly stated the law, and that if the effect of any of the evidence should have been limited by the instructions that such instructions so limiting it were declared to the jury. (Code Civ. Proc., sec. 2061.) This observation is pertinent to be kept in mind in a consideration of most of the points made by appellants relating to the admission and rejection of testimony. It is contended again, that the court erred in refusing to allow appellant Balmer to testify as to whether he had done everything he thought necessary or proper to do in the case which was tried. The evidence showed fully all of the facts as to what was done before and at the trial of the action, and the jury was called upon to determine as to whether counsel had performed their full duty in that behalf. One of appellants, Mr. Hannon, did testify quite fully as to having acted, according to the view he took of the case, diligently for the best interest of his clients. One of the grounds for damages alleged to have been caused to respondents was that appellants should not have permitted the city to be dismissed from the action which was tried, but that a cross-complaint should have been filed and so caused to be determined in the one action all questions between respondents and the city relating to the title to the land in dispute. Mr. Hannon explained why this was not done and why in his judgment and the judgment of his associates it was deemed best not to take the affirmative as against the city, but evidently the jury, as it had the right to do, concluded that counsel was negligent in not so acting. Were that question, as a matter of fact, submitted here and were it a proper one for review, this court might well differ with the jury as to its conclusion. However, that matter is past questioning. It does seem from the record that the work devoted by counsel to the interest of respondents was laborious and involved a large amount of time and attention to detail. The amount awarded to them by the jury seems very small, considering the services rendered; still upon a careful examination of each of the points made for reversal, and assuming, as has been before suggested, that the jury was fully and correctly instructed as to the law, it cannot be said that any prejudicial errors have been shown which demand that a new trial should be ordered.

From affidavits used on the motion for a new trial it was shown that the jury first brought in two verdicts, one in favor of appellants for five hundred dollars, and the other in favor of respondents for three hundred and twenty-five dollars. Upon instruction from the court the jury was returned to the jury room and thereafter submitted one verdict in favor of appellants for the sum of one hundred and seventy-five dollars. The minute record shows only the return of the verdict for one hundred and seventy-five dollars. It may be assumed, conceding that the question of irregularity in the action of the jury is properly presented, that the jury intended by their double verdict first offered, to determine that the full value of the services rendered by appellants, had there been no negligence, was the sum of five hundred dollars, but that there had been negligence and damage suffered as a consequence which reduced the value of the services by the sum of three hundred and twenty-five dollars. It was altogether proper under the circumstances for the court to have the jury returned to the jury room and the verdict corrected.

A discussion has not been made of each point as detailed in the brief of counsel for appellants, but a very careful consideration of the argument in support of the contention that the order denying the motion for a new trial should be reversed, does not suggest a conclusion favorable to appellants' view of the case.

The order is affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1868. First Appellate District.—July 25, 1914.]

FRANK H. AYERS et al., Appellants, v. W. S. KINGSBURY, as Surveyor-General and Ex-officio Register of State Land-Office, Respondent.

STATE LAND—APPLICATION TO PURCHASE—PURPOSE AND EFFECT OF DEPOSIT AND RECEIPT THEREFOR.—The deposit required by statute from an applicant for the purchase of state land is intended to be nothing more than a mere conditional deposit, and the receipt to be given therefor does not become a part of the purchase price, and cannot be accepted as such, before the application to purchase has been approved.

ID.—PROCEEDINGS TO PURCHASE LAND—STATUS OF PURCHASER DURING PENDENCY—WHEN RIGHTS BECOME IRREVOCABLE.—Pending the preliminary proceedings prescribed for the purchase of public lands, the state recognizes no absolute right in the applicant, and does not enter into a contract of purchase and sale with him until the payment of the first installment of the purchase price; that is to say, not until the applicant receives a certificate of approval under section 3498 of the Political Code, and has taken it to the county treasurer and made the first payment of twenty per cent of the purchase price, does the state recognize any irrevocable right in the applicant. When this has been done, then the state closes a contract of purchase and sale, and evidences it by the issuance of a certificate of purchase, showing the class of lands purchased, etc.

ID.—WITHDRAWAL OF LAND FROM SALE—EFFECT ON PENDING APPLICATION TO PURCHASE.—The withdrawal of public lands from sale prior to approval of the applications to purchase, and the payment in whole or in part of the purchase price, finally and effectually ends all preliminary proceedings instituted for the purchase of the lands.

ID.—COMPLIANCE BY PURCHASER WITH PRELIMINARY REQUIREMENTS—EXTENT OF RESULTING RIGHTS.—The mere compliance of applicants to purchase state lands with the requirements of the law relating to the making and filing of applications therefor, secures to them nothing more than the privilege of becoming the exclusive purchasers of the lands applied for in the event that the state does not withdraw them from sale before the contract of purchase is completed by the approval of the application and the payment of the first installment of the purchase price.

ID.—WITHDRAWAL OF SCHOOL LAND—MANDAMUS TO COMPEL SURVEYOR-GENERAL TO ACT ON PENDING APPLICATIONS TO PURCHASE.—*Mandamus* does not lie to compel the surveyor-general to file applications to purchase from the state as school lands certain sixteenth and thirty-sixth sections, although at the time the applications were presented the lands were open for sale, if subsequently to such presentation

and prior to the expiration of the time for the approval of the applications by the surveyor-general, the state by legislative enactment withdrew the lands from sale and expressly prohibited the surveyor-general from receiving or filing any applications to purchase them.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Devlin, Devlin & Maddux, and Chas. C. Boynton, for Appellants.

U. S. Webb, Attorney-General, Malcolm C. Glenn, Deputy Attorney-General, and Robert W. Harrison, Deputy Attorney-General, for Respondent.

LENNON, P. J.—This is a proceeding in *mandamus*, instituted in the superior court of the city and county of San Francisco against the respondent in his official capacity as surveyor-general and *ex-officio* register of the state land-office. The petition for the writ was demurred to by the respondent upon the grounds that the facts stated did not constitute a cause of action, and that the proceeding was barred by the provisions of section 338, subdivision 1, of the Code of Civil Procedure. The demurrer was sustained, and the petitioners declining to amend, judgment was entered for the respondent, from which an appeal has been taken to this court upon the judgment-roll.

The only question discussed in the briefs of counsel for the respective parties is the sufficiency of the pleaded facts to constitute a cause of action. We shall assume therefore that the question of the statute of limitations was not presented in the lower court and that it has been abandoned here.

Generally stated the facts of the case, as revealed by the petition for the writ, are as follows: On or about March 22, 1909, the petitioners presented to the respondent for filing and approval their respective applications to purchase from the state as school lands certain sixteenth and thirty-sixth sections lying within the exterior boundaries of national forest reserves. The lands applied for became the property of the state by grant from the United States, and were at the time

the several applications were presented for filing, open for sale by the state. Each application when presented to the respondent was accompanied by a tender of the filing fee and a deposit of twenty dollars, and in all other respects conformed to the requirements of the then existing law relating to the making and filing of applications to purchase public lands (Pol. Code, title VIII, chap. 1; Stats. 1889, p. 434). In each instance, however, the respondent declined to accept the filing fee and deposit, and ultimately refused to formally file the several applications.

With the foregoing facts as a basis the petitioners prayed for the mandate of the lower court, commanding and compelling the respondent to formally file and enter of record *nunc pro tunc* the several applications as of the dates of their presentation to the respondent.

The respondent concedes that the facts stated in the petition for mandate would be sufficient to warrant the issuance of the writ if it were not for the fact that, subsequent to the presentation of the applications, and long prior to the institution of the present proceeding, the state by various legislative enactments withdrew the lands in question from sale, and expressly prohibited the respondent from receiving or filing any applications to purchase such lands, and commanded him to take no action upon any such applications previously filed or presented for filing other than to cancel the same. (Stats. 1909, p. 680; Stats. 1911, p. 311; Stats. 1911, p. 1408.)

It will be noted in passing that the several statutes just referred to respectively became the law of the state on March 24, 1909, March 8, 1911, and May 11, 1911.

The applications to purchase, as previously noted, were presented to the respondent on or about March 22, 1909; and the petition for the writ in the present case was filed March 19, 1912. It is the contention of the petitioners that the mere presentation of their several applications to purchase, accompanied by a tender of the filing fee, and an offer to deposit the twenty dollars required by the statute of 1889, gave them a vested right in the lands in question, which could not be destroyed by the subsequent withdrawal of such lands from sale. More accurately stated, it is the contention of the petitioners that, inasmuch as their applications to purchase the lands in question complied in every respect with the requirements of the law existing at the time the applications were

presented for filing, a contract of purchase and sale was thereby consummated with the state, the obligation of which could neither be abrogated nor impaired by subsequently enacted legislation withholding from sale the lands which were the subject of the contract. It is not disputed by the respondent that if the interests of the petitioners in the lands in question had ripened into consummated contracts of purchase and sale, no subsequent act of the legislature could be invoked upon behalf of the state to avoid the obligation of the contracts; but it is contended that, even if the applications to purchase had been duly filed and entered of record in the office of respondent, and the filing fee and twenty dollars' deposit accompanying the applications had been received and accepted by him, still no contract of purchase and sale could have been consummated until the applications were first approved by the respondent and then followed by the payment of the first installment of the purchase price, and the issuance by the state of a certificate of purchase, as required and provided for in sections 3498 and 3514 of the Political Code.

In view of the position taken by respondent we do not deem it necessary to discuss the question as to when, as a matter of law, a paper is to be deemed filed with a public officer, further than to say that conceding, as is contended, that the rights of the several petitioners could not be defeated by the mere arbitrary refusal of the respondent to receive and file their several applications, we are of the opinion nevertheless that the actual filing of the applications to purchase the lands in question, accompanied by the filing fee and the twenty dollars' deposit required by the statute, would not alone have constituted a complete contract of purchase and sale. This conclusion is founded upon a consideration of the various provisions of the codified and statute law of the state relating to and controlling the sale of public lands. Insofar as the question involved in the present case is concerned, the procedure provided by the state for the purchase of its public lands, and the conditions precedent to a completed contract of purchase and sale, are to be found exclusively in the Political Code and the act of 1889 (Stats. 1889, p. 634), and may be briefly outlined as follows: The class or character of public lands subject to sale, and the terms and conditions of sale, are prescribed by section 3494; and section 3495 prescribes what the applications to purchase must contain. Section 3498 re-

quires that all applications must be retained by the respondent for ninety days before approval, and must be approved, except in certain contingencies, at the expiration of six months. Section 3494 directs and requires the applicant to pay twenty per cent of the purchase price within fifty days from the date of the issuance of the certificate of location, a copy of which, by the provisions of section 3512, must be presented to the county treasurer of the county in which the land is situated, who must receive the amount to be paid, and indorse his receipt therefor upon the certificate of location and return the same to the purchaser. Section 3513 declares that if the first payment of twenty per cent is not made within the fifty days provided by section 3494, the certificate of location becomes void; but, under the provisions of section 3514, "whenever the register receives from the county treasurer a statement showing that an applicant for state lands has made the first payment, he must issue to the person entitled thereto a certificate of purchase, showing the class of land purchased, the number of acres, the price per acre, the date of payment, the date from which interest is to be computed, the amount paid and the amount remaining unpaid, which certificate is *prima facie* evidence of title." Such certificate and all the rights acquired thereunder are by the provisions of section 3515 expressly made the subject of sale by deed or assignment. The remaining code sections which have application to the question in mind here, provide in substance that the county treasurer shall report monthly to the register all moneys received for lands during the preceding month, and also the number of the location and the name of the purchaser. Such report must be forwarded to the register at once; and upon receipt thereof he must enter the reported payment to the credit of the purchaser. (Pol. Code, secs. 3422, 3423.)

The act of 1889 (Stats. 1889, p. 634) provides in part (sec. 1) that every application shall be accompanied by a deposit of twenty dollars in addition to the filing fee required by law, for which the surveyor-general shall give the applicant a receipt, which receipt shall be accepted by the county treasurer in part payment of the purchase price of the land. The act further provides that the deposit so made and receipted for shall be forfeited in the event that the applicant shall abandon his application, or fail to make proper proof as to the char-

acter of the land, etc., or if his application be rejected by reason of any false statement in his affidavit.

The ninety day period provided by section 3498 within which applications may not be approved is for the benefit of occupants and actual settlers on land (sec. 3497); to enable the surveyor-general to ascertain the character of the land applied for (sec. 3495), and to see that timber lands are not sold except upon payment of the full purchase price in cash. (Sec. 3500.) During such period, and in fact at any time before patent is issued, contests may be made. (Secs. 3498, 3414 et seq.)

The act of 1889 is undoubtedly supplemental to and in aid of the various provisions of the Political Code previously enacted, and therefore must be considered and construed in conjunction with the procedure and conditions prescribed by those sections for initiating the purchase of public lands. This being so, and having in mind the fact that applications to purchase public lands must, after being filed, wait not less than ninety days before being approved, and that after the certificate of approval is issued the applicant must within fifty days make his first payment of twenty per cent of the purchase price to the county treasurer, we are of the opinion that the deposit called for by the act of 1889 was intended and required merely as an evidence of good faith rather than as a preliminary part payment of the purchase price of the lands applied for. In other words, we are convinced by a consideration of the provisions of the statute and the several code sections under discussion, that the deposit required by the statute was intended to be nothing more than a mere conditional deposit, and that the receipt to be given therefor does not become a part of the purchase price, and cannot be accepted as such, before the application to purchase has been approved. It would appear, therefore, that pending the preliminary proceedings prescribed for the purchase of public lands, the state recognizes no absolute right in the applicant, and does not enter into a contract of purchase and sale with him until the payment of the first installment of the purchase price; that is to say, not until the applicant receives a certificate of approval under section 3498 of the Political Code, and has taken such approval to the county treasurer and made the first payment of twenty per cent of the purchase price does the state recognize any irrevocable right in the applicant.

When this has been done then the state closes a contract of purchase and sale, and evidences such contract by the issuance of a certificate of purchase, showing the class of lands purchased, etc.

This conclusion might be fully fortified by a more minute analysis of the various provisions of the codified and statutory state land laws hereinbefore summarized; but such analysis is rendered unnecessary inasmuch as the conclusion here reached is confirmed by a consideration of the many cases in this and in other jurisdictions, where, in defining the purpose and effect of the same or similar land laws, it has been held in effect that the withdrawal of public lands from sale prior to approval of the applications to purchase, and the payment in whole or in part of the purchase price, finally and effectually ended all preliminary proceedings instituted for the purchase of such lands. (*Hutton v. Frisbie*, 37 Cal. 475; *People v. Shearer*, 30 Cal. 645; *Johnson v. Squires*, 55 Cal. 103; *Eckart v. Campbell*, 39 Cal. 256; *Yosemite Valley Case*, 15 Wall. 77, [21 L. Ed. 82]; *Shepley v. Cowan*, 91 U. S. 330, [23 L. Ed. 424]; *Shiver v. United States*, 159 U. S. 491, [40 L. Ed. 231, 16 Sup. Ct. Rep. 54]; *Campbell v. Wade*, 132 U. S. 34, [33 L. Ed. 240, 10 Sup. Ct. Rep. 9]; *Gonzales v. French*, 164 U. S. 338, [41 L. Ed. 548, 17 Sup. Ct. Rep. 102]; *Graham v. Great Falls Water etc. Co.*, 30 Mont. 393, [76 Pac. 808]; *State v. Work*, 63 Tex. 148; *People v. Banning*, 166 Cal. 635, [138 Pac. 101].)

In the early case of *Eckart v. Campbell*, 39 Cal. 256, our supreme court had under consideration former provisions of the state land law similar if not identical in language and purpose to the code sections under consideration here, and there the court said: "It does not seem to have been the intention of the statute that the state should be considered as having parted with any interest in the land until she had received the payment of at least the first installment of the purchase money"; and in the comparatively recent case of *Messenger v. Kingsbury*, 158 Cal. 611, [112 Pac. 65], it was said that "The decisions of this court are clear to the effect that an applicant who has merely filed his affidavit and application to purchase, without paying any part of the purchase price, under statutes essentially similar to the scheme provided by the Political Code for the disposition of public lands, has no

vested right as will prevent a termination of the opportunity to purchase upon a repeal of the law providing for the sale."

The reasoning and conclusion reached in the cases cited and quoted proceeded upon the theory that the statutory procedure and conditions provided for initiating the purchase of public lands are purely preliminary to the completed contract of purchase, and that compliance with such procedure and conditions merely conferred upon the applicant the exclusive privilege of becoming the purchaser of the lands applied for upon approval of the application and the payment of the twenty per cent of the purchase price within fifty days after the issuance of the certificate of location. The scope and effect of the act of 1889 (Stats. 1889, p. 634) do not appear to have been under consideration in the case of *Messenger v. Kingsbury*, 158 Cal. 611, [112 Pac. 65], nor has that act so far as we have been able to ascertain been elsewhere construed. We are satisfied, however, that the act in question is not fairly susceptible of a construction different from that placed upon it here; therefore we apprehend that the reasoning and the result reached in the case of *Messenger v. Kingsbury*, and the kindred cases therein cited, would not have been otherwise even if the statute in question had been invoked and considered.

Upon like reasoning the conclusion must follow in the present case that the mere compliance by the petitioners with the preliminary procedure provided for the sale of state lands, secured to them nothing more than the privilege of becoming the exclusive purchasers of the lands applied for in the event that the state did not withdraw the said lands from sale before a contract of purchase and sale was completed by the approval of the application and the payment of the first installment of the purchase price.

This brings us more minutely to a consideration of the remedy sought by the petitioners. It will be remembered that the petitioners are seeking to compel the respondent to enter as filed upon the records of his office the applications to purchase public lands which it is alleged should have been so entered at the time they were presented to the respondent for filing some several years ago. It may be conceded that the law in force at the time the applications were presented made it the duty of the respondent to formally enter them of record as filed in his office. The fact remains, however, that he

has never performed this duty; and it affirmatively appears from the allegations of the petition that a few days after the applications to purchase had been offered for filing, the lands applied for were withdrawn from sale by the state, and at the same time the surveyor-general was expressly prohibited by law from thereafter receiving or filing any applications for the purchase of such lands; and that no action or procedure was instituted to enforce the filing of the petitioners' applications while it still remained the duty of the surveyor-general to do so. Under these circumstances a writ of mandate will not now issue to compel the respondent to file the petitioners' applications, either as of the present date or as of the date when the applications were originally tendered for filing. This is so because a writ of mandate will not issue to compel the performance of an act which when performed would be of no avail to the petitioners for the writ. (*Kerr v. Superior Court*, 130 Cal. 183, [62 Pac. 479]; *Ellis v. Workman*, 144 Cal. 113, [77 Pac. 822]; *Messenger v. Kingsbury*, 158 Cal. 611, [112 Pac. 65]; *San Diego v. State*, etc., 164 Cal. 41, [127 Pac. 153].)

If we are correct in the conclusion hereinbefore expressed, that the state may rightfully withdraw public lands from sale at any time before approval of the application to purchase and the payment of the first installment of the purchase price, and that such withdrawal effectually terminates the preliminary proceedings instituted by the applicant for the purchase of such lands, then it must follow in the presence of the existing law, prohibiting the sale of the lands in question, that it would be a vain and idle act to compel the respondent to perform a one time duty which, when performed, would not operate to revive and revest in the petitioners whatever inchoate rights they may have had in the first instance. (*Messenger v. Kingsbury*, 158 Cal. 611, [112 Pac. 65].)

The judgment appealed from is affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 23, 1914.

[Civ. No. 1367. First Appellate District.—July 25, 1914.]

F. A. HOOPER et al., Appellants, v. W. S. KINGSBURY, as Surveyor-General and Ex-officio Register of the State Land-Office, Respondent.

STATE LAND—WITHDRAWAL FROM SALE AFTER FILING OF APPLICATIONS TO PURCHASE.—The state has power to withdraw lands from sale after the filing but prior to the approval of applications to purchase and the payment of the first installment of the purchase price.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Devlin, Devlin & Maddux, and Charles C. Boynton, for Appellants.

U. S. Webb, Attorney-General, Robert Harrison, Deputy Attorney-General, and Malcolm C. Glenn, Deputy Attorney-General, for Respondent.

LENNON, P. J.—This case in its essential features is practically the same, insofar as the points of law involved are concerned, as the case of *Ayers v. Kingsbury* (No. 1368), *ante*, p. 183, [143 Pac. 85], this day decided. In its facts, the present case differs from that case only in the particular that the applications to purchase public lands were actually filed with the respondent. Those applications, however, were not approved before the withdrawal of the lands from sale. No approval of such applications could have issued prior to the enactment of the statute withdrawing all the lands in question from sale; and therefore, under the theory discussed and developed in the opinion of this court filed in the case of *Ayers v. Kingsbury* above mentioned—which is to the effect that the state has power to withdraw lands from sale prior to the approval of the applications to purchase and the payment of the first installment of the purchase price, it follows that the petitioners herein are in no better situation than the petitioners in that case, and that they acquired no irrevocable right to purchase from the state the lands applied for, not-

withstanding the payment by them of the filing fee and the deposit of the amount specified in the act of 1889.

The judgment is affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 23, 1914.

[Civ. No. 1196. First Appellate District.—July 27, 1914.]

OAKLAND BARGE AND LIGHTER COMPANY (a Corporation), Appellant, v. CHARLES T. FOSTER, Respondent.

NEGLIGENCE—LOSS OF LEASED BARGE—SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS EXONERATING LESSEE.—In this action by the lessor of a barge against the lessee to recover for its loss, the evidence is sufficient to support the findings that, at the time of the loss, the barge was being operated in a careful and proper manner by the defendant, that everything that human skill and agency could do to prevent the loss was being done by him, that the loss was entirely without his fault, and that it was occasioned by causes beyond human control.

ID.—LEASE OF BARGE—DEGREE OF CARE EXACTED OF LESSEE.—Such case presents a loss of property while in use under a compensated bailment, and therefore the defendant could be held liable for the loss only in the event that he failed to employ ordinary care and prudence in the use of the property.

ID.—LOSS DURING UNUSUAL STORM—BURDEN OF PROOF AS TO NEGLIGENCE.—If the defendant contends that the barge was lost as a result of a sudden, unusual, and extraordinary storm, the burden is upon him to establish such fact; and when he has done this, the burden shifts to the plaintiff to the extent of affirmatively showing that, notwithstanding the storm, the barge would not have been lost but for the defendant's negligence or his want of skill or care in operating it.

ID.—CONFLICTING EVIDENCE—CONCLUSIVENESS OF DECISION OF TRIAL COURT.—If there is a substantial conflict in the evidence on this issue, the decision of the trial court based thereon will not be disturbed on appeal.

ID.—LOSS OF BARGE IN STORM—EVIDENCE OF EFFECT OF STORM ON OTHER VESSELS.—On the issue whether the barge was lost through the negligence of the defendant or as the result of a storm, evidence of the effect of the storm upon other vessels similarly situated is relevant and material.

ID.—EXPERT EVIDENCE—HYPOTHETICAL QUESTIONS—NECESSARY BASIS. On such issue an objection that the facts stated in the hypothetical questions put to an expert witness are not sufficient in themselves to enable him to form and express an opinion as to the causes which produced the loss of the barge, goes to the weight of the evidence sought to be elicited by the questions rather than to the admissibility of such evidence, and is properly overruled.

ID.—HYPOTHETICAL QUESTIONS—UPON WHAT MUST BE FOUNDED.—Hypothetical questions must always be founded upon admitted facts or other evidence in the case.

ID.—MOTION TO STRIKE OUT EVIDENCE—ABSENCE OF PREVIOUS OBJECTION.—A motion to strike out evidence, if not preceded by any objection, will be overruled.

ID.—UNRELIABILITY OF TOW-BOATS OPERATED BY GASOLINE—STRIKING OUT OF EXPERT TESTIMONY REGARDING—HARMLESS ERROR.—The striking out in such action of expert testimony as to the general unreliability of tow-boats operated by gasoline engines is harmless error, if no claim is made that the failure of such engines to work, while being used to tow the barge during the storm, contributed to the loss of the barge.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. E. P. Mogan, Judge.

The facts are stated in the opinion of the court.

Milton S. Hamilton, for Appellant.

H. W. Hutton, and A. P. Black, for Respondent.

LENNON, P. J.—Briefly stated, the complaint in this action of claim and delivery alleged that the plaintiff had leased to the defendant a barge of the value of sixteen hundred dollars at a rental of seventy-five dollars per month; that the defendant refused to pay the second month's rent, and refused and failed upon demand to return the barge to plaintiff. The defendant in his answer admitted that he had failed to return the barge to plaintiff; but pleaded as a defense to the action that he was prevented from doing so because the

barge, while in use upon San Francisco Bay, was driven ashore and wrecked as the result of a sudden, unusual, and extraordinary storm. In this behalf the answer of the defendant further alleged in effect that at the time of the hiring it was understood and agreed that the barge would be used for the purpose of transporting gravel from Napa Creek to the city and county of San Francisco, and would be subject to all of the risks incident to such voyage, and that, at the time of its loss, the barge was loaded with gravel, and being towed by agents of the defendant in a proper and careful manner, and that everything that human skill and agency could do to prevent such loss was done by the defendant.

The trial court, among other things, found the facts surrounding the loss of the barge to be as alleged in the answer of the defendant; and as a conclusion of law therefrom declared that the plaintiff was not entitled to judgment. Judgment was accordingly rendered for the defendant, from which and from an order denying a new trial the plaintiff has appealed.

The principal point presented for a reversal involves the sufficiency of the evidence to support the trial court's finding of fact that, at the time of the loss of the barge, "she was being operated in a careful and proper manner by defendant, and everything that human skill and agency could do to prevent such loss was done by the defendant, and the said loss was entirely without his fault, but was occasioned by causes beyond human control."

This finding, we think, is sufficiently supported by the evidence adduced in support of the defendant's case, which in substance is as follows: The plaintiff knew that the barge was hired and would be used for the purpose of transporting gravel from Napa Creek to the city of San Francisco. The barge was being used solely for that purpose at the time of its loss. The barge left Napa Creek loaded with gravel in tow of the tow-boat "Anacapa." The crew of the "Anacapa" consisted of the master, one man, the engineer, a licensed pilot, and two boys about eighteen or twenty years old. Her engines were in perfect working order, and she was properly and fully equipped and found for the work in which she was engaged. At the start the weather was good, and the "Anacapa" with the barge in tow proceeded as far as Point Pinole, where the anchor was dropped. When the tide turned,

the weather still being fair, the journey to San Francisco was resumed. Approaching The Brothers, it began to breeze up; and it was agreed between the master and pilot of the tow-boat that it would be best to go into Pirate Cove off Angel Island in San Francisco Bay. This was done, and there the barge was anchored with two anchors attached to a 4½ inch Manila rope. Shortly thereafter the anchor line parted. The wind was northwest, an extraordinary and unusual wind for that time of the year. After the breaking of the anchor the crew endeavored to tow the barge with a 4½ inch Manila rope in good condition, but the line broke twice, and after that it became impossible without great danger to put a man aboard the barge to make fast another tow-line. The tow-boat whistled for assistance and kept with the barge. Another tow-boat responded, but its crew failed in an effort to get a line aboard the barge. The barge, with the "Anacapa" hovering near, drifted out to the Heads. When the tide turned she drifted in and went ashore at Baker's Beach. The wind on the bay at or about the time the barge broke her anchor and tow-lines was blowing about twenty-five miles an hour, and the sea was very rough. The wind was not blowing a steady blow; it was blowing squally. The 4½ inch Manila rope and two lines in use upon the "Anacapa" were considered very strong lines, and ordinarily would have been sufficiently strong to hold and tow the barge in question. The combined force of wind and tide caused the anchor and tow-lines to break. The "Anacapa" had sufficient power to tow and handle a barge loaded with one hundred and twenty-five tons of gravel. The barge in question was loaded with but ninety-three tons of gravel.

It is conceded that the case as a whole shows the loss of property while in use under a compensated bailment, and that therefore the defendant could be held liable for the loss only in the event that he had failed to employ ordinary care and prudence in the use of the property. It is also conceded that the burden of proof was upon the defendant to show that the barge in question was lost as a result of a sudden, unusual, and extraordinary storm; and that when this was done the burden of proof shifted to the plaintiff to the extent of affirmatively showing that, notwithstanding the storm the barge would not have been lost but for the defendant's negligence or his want of skill or care in operating the barge. It is insisted, however,

upon behalf of the plaintiff that the evidence shows that the loss of the barge was not caused, either proximately or remotely, by a storm of sufficient severity to have probably caused the loss without fault on the part of the defendant, but that such loss was directly due to defendant's negligence and carelessness in operating the barge with an inefficient tow-boat and defective equipment. The evidence upon this phase of the case is discussed in detail by counsel for the plaintiff in a very earnest endeavor to show that it is in favor of the plaintiff, and therefore should have compelled a finding against the defendant. But upon a careful review of the record we are satisfied that the effort of counsel is but an argument directed merely to the weight of conflicting evidence. The evidence relating to the sufficiency of the tow-boat to ordinarily perform the work for which it was engaged, and the sufficiency of the equipment, is, we think, in substantial conflict. The weight of the evidence was a question to be determined exclusively by the trial court; and its decision of a question of fact based upon conflicting evidence will not be disturbed here.

A witness for the defendant testified that he was the captain of the tow-boat "Millie," and that on the day and about the time the barge in question broke her anchor and tow-lines, the "Millie," with the witness in command, was towing a steamer on San Francisco Bay; and that when abreast of Angel Island the tow-line carried away three times as the result of a strong wind and heavy tide. The objection to this testimony was properly overruled. The purpose of the testimony was undoubtedly to show the prevalence and severity of the storm in that portion of the bay in which the barge in question broke her anchor and tow-lines. For such purpose the effect of the storm upon other vessels similarly situated was relevant and material. (Jones on Evidence, sec. 141.)

Several hypothetical questions, purporting to be based upon the facts and circumstances preceding and attending the loss of the barge, were put to a witness for the defendant. In each instance the question was objected to upon the ground that it assumed facts not in evidence. The objection was well taken, and should have been sustained. When the questions were put to the witness the supposed facts which formed their basis had not been established in evidence. Hypo-

thetical questions must always be founded upon admitted facts or other evidence in the case; and if the questions complained of had not been followed by evidence of facts upon which they were based the overruling of the plaintiff's objections would have been prejudicial error. While the procedure adopted by the trial court in the reception of the evidence complained of was careless and confusing, nevertheless, upon the whole we are satisfied that it did not result in substantial injury to the plaintiff.

The objection that the facts stated in the hypothetical questions were not sufficient in themselves to enable the witness to form and express an expert opinion as to the causes which produced the loss of the barge, went to the weight of the evidence sought to be elicited by the questions, rather than to the admissibility of such evidence.

Complaint is made of the ruling of the trial court striking out that portion of the testimony of the witness Leffingwell which was to the effect that, in his opinion, tow-boats operated by gasoline launches were not generally reliable. The motion to strike out was made upon the ground that the proper foundation for the question which called for the opinion of the witness had not been laid, in that it had not been shown that the witness was familiar with tow-boats operated by gasoline engines. Upon the ground stated the motion to strike out should have been denied. In the first place the motion was not preceded by a proper or any objection; and in the second place, the examination of the witness developed the fact that he, as a marine engineer and pilot, had made sufficient observation of tow-boats operated by gasoline engines to enable him to express an opinion as to the reliability of such engines. The ruling, however, was harmless. While the tow-boat in question was operated by a gasoline engine, yet it was not claimed that the failure of the engine to work during the storm contributed to the loss of the barge. No such issue was presented by the evidence; and therefore testimony as to the general unreliability of tow-boats operated by gasoline engines was wholly immaterial. This being so, the presence of the testimony stricken out would not have tended in the slightest degree to warrant and support a finding in favor of the plaintiff.

We have examined the remaining assignments of error in the rulings of the trial court, and we are satisfied that they are

without merit and not of sufficient importance to require discussion.

The judgment and order appealed from are affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 25, 1914.

[Civ No. 1487. First Appellate District.—July 28, 1914.]

ROBERT BRAGG, as Executor of Will of Mary Jane Bragg, Deceased, Appellant, v. REBECCA BRAGG MARTENSTEIN, Respondent.

GIFT TO BE CONSUMMATED IN CASE OF DEATH—PACKAGE OF STOCK AND BONDS—INDORSEMENT ON WRAPPER.—An understanding between a man and his daughter that each of them shall prepare papers disposing of their respective properties, which are to be placed in their respective packages, and that, in case it becomes apparent to either that the other is about to die, the former shall put the contents of the package or envelopes of the one about to die into the possession of the parties to whom their inclosures are respectively addressed, is not changed, nor is the agency to make delivery of the package or envelopes of the daughter containing indorsed stock and bonds revoked, by the written indorsement by her on the brown paper wrapper, "In case of my death to be opened only by Robert Bragg, Sr., or Rebecca Bragg Martenstein," who are her father and sister and who are designated as executors in her contemporaneous will disposing of the rest of her estate, there being no direction in any of the writings as to the delivery of the inclosures upon the opening of the package.

Id.—INTERPRETATION OF WORD "ONLY" ON WRAPPER OF PACKAGE.—The word "only," contained in such indorsement, is a limitation upon the persons who might open the package, and not upon the time when it is to be opened.

Id.—CONTEMPORANEOUS WRITINGS — INTERPRETATION TOGETHER.—The writing upon the outside of the wrapper and the writings upon and within its inclosures, if made contemporaneously and as parts of the same transaction by the decedent, are to be construed together; but no part of such writings is to receive an interpretation which will render them unlawful, inoperative, indefinite, unreasonable, and incapable of being carried into effect.

ID.—CIRCUMSTANCES UNDER WHICH WRITINGS WERE MADE—RECOURSE TO IN DETERMINING THEIR MEANING.—It is the duty of a court, when such documents come before it, to place such an interpretation upon the obscure direction of the writing upon the outside of the wrapper as will not only give a reasonable effect to what the writer intended by it, but in so doing, will also render effectual and valid the intent and purpose of the writer as expressed in its inclosures; and in order to do this, it is the province of the court to have recourse to the circumstances under which these several contemporaneous writings were made, as disclosed by the undisputed evidence in the case.

ID.—INTERPRETATION OF CONTRACT—WHEN QUESTION OF LAW.—When a writing requires explanation, and the circumstances surrounding its creation, as disclosed by the evidence, are undisputed, it becomes a question of law for the court, not a question of fact for the jury, to determine what the proper construction of the writing should be.

ID.—INTENTION OF DECEASED—EVIDENCE ESTABLISHING—DIRECTION OF VERDICT.—In this action by the executor of the will of the daughter to recover damages for the alleged conversion of the stocks, the undisputed facts as disclosed by the plaintiff himself, the father, show that it was the life-long purpose and intent of his daughter that her four sisters should be invested with the ownership of the respective shares of stock and bonds which were inclosed in the envelopes respectively indorsed and directed to them, and that this should be done by the delivery of such envelopes to the persons to whom they were directed when it became apparent to her father that she was about to die, that he was to act as her agent in the execution of such purpose, and that no intent on the part of the daughter to change this plan or revoke this agency was ever manifested by her to him during her life; and the court, with all these facts before it, properly instructed the jury to return a verdict for the defendant.

ID.—COSTS OF ADMINISTRATION OF ESTATE—PAYMENT OUT OF DIVIDENDS FROM STOCKS.—An understanding between the daughter and her father that the dividends and income from the stocks and bonds which he had put into the possession of her sisters was to be applied to the costs of administering her estate, is not a condition in any way affecting the validity of the gifts themselves, but at the most an obligation cast upon the respective donees to apply these revenues to the indicated purpose.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Gerald C. Halsey, for Appellant.

Randolph V. Whiting, and T. A. Perkins, for Respondent.

KERRIGAN, J.—This is an action brought by Robert Bragg, as one of the executors of the last will and testament of his daughter, Mary Jane Bragg, deceased, against Rebecca Bragg Martenstein, another of his daughters, and the coexecutor of the will of his said deceased daughter, to recover damages for the alleged wrongful conversion of certain stocks, the property of the decedent during her lifetime. The case was tried before the court with a jury; upon the conclusion of the testimony and upon motion of the defendant, the court directed the jury to return their verdict in defendant's favor, and it is the alleged error of the court in so doing which presents the chief question for consideration upon this appeal.

The facts of the case are practically undisputed, and are chiefly derived from the testimony of the plaintiff himself. They show that the plaintiff was the father of a family of fourteen children, among whom were five daughters, of whom the deceased, Mary Jane Bragg, was the eldest. For many years Mary Jane Bragg was a teacher in the public schools of San Francisco, during which time she accumulated considerable property, about forty thousand dollars worth of which was invested in the stocks and bonds of various corporations. A number of years ago she retired from teaching, and during the latter years of her life was afflicted with an affection of the heart, from which she was likely to die suddenly at any time, and to which, in fact, her decease was due. In the year 1898, Mary Jane Bragg and her father, the plaintiff herein, entered into an understanding and agreement that each of them should prepare or have prepared papers disposing of their respective properties, which were to be placed in their respective packages and that, in case it become apparent to either that the other was about to die, the former should put the contents of the package or envelopes of the one about to die into the possession of the parties to whom their inclosures were addressed. In pursuance of this arrangement, and during the month of February, 1910, Mary Jane Bragg prepared four envelopes, which contained certain of her stock or bonds, duly indorsed by her; and upon each of said envelopes she wrote the name of one of her said sisters,

with the statement that the inclosure was her property. She then inclosed each of these envelopes in another envelope addressed to that one of her sisters to whom the inner envelope referred. She also at this time made her will, in which she specifically disposed of the rest of her property, but from which she omitted all reference to the stock and bonds which she had thus placed in their respective envelopes. Her father and her sister, the defendant herein, were made the executors of this will. The envelopes above referred to were placed in an open desk in her room, which was at all times open and available to the plaintiff, in whose home she lived and died. The relation between herself, her father, and her sisters was at all times during her life one of unclouded confidence and affection. About four days before her death, in July, 1910, the plaintiff was in her room, having been informed by her physician that she had but a few more days to live, and he himself believing her to be dying, and believing also that the time had come for carrying out her wishes with respect to these several envelopes and their inclosures, he went to her open desk, and taking from it the four envelopes addressed by his dying daughter to her four sisters respectively, went out and mailed each of them to the person to whom each was thus addressed. On the following day he saw the defendant herein, and learning that she had received her envelope by mail, advised her to have the stocks which it contained transferred at once into her own name upon the books of the several corporations, and he gave the like advice to his other daughters, who acted thereon before their sister's death. At the time the plaintiff took the several envelopes in question from the desk of his daughter, she was lying propped up in bed, in full view of her desk and of himself, but was apparently asleep. He did not speak to her then as to what he was about to do, or thereafter as to what he had done, because of her dying condition, although her mind remained clear up to the time of her death; nor did her sisters, acting on his advice, directly refer to the fact of their receipt of her gifts, apparently for the same reason. At the time the plaintiff took these several envelopes from his daughter's desk, they were wrapped, according to the plaintiff's testimony, in a piece of common brown paper and tied with a piece of common string. This wrapper, he states, he threw into a waste-basket, in another room, without looking closely at it;

and there it remained until after his daughter's death, which occurred four days later. Some time after her death he noticed this piece of brown wrapping paper in the wastebasket and observed that it had some writing upon it, in the hand of his deceased daughter, and which was in the following words: "In case of my death, to be opened only by Robert Bragg, Sr., or Rebecca Bragg Martenstein. Signed, Mary Jane Bragg. Dated, San Francisco, Feb. 4, 1910." The piece of this paper containing this writing he preserved. Shortly thereafter the will of Mary Jane Bragg was produced and presented for probate by the plaintiff and the defendant, as the coexecutors thereof. From the petition for probate and the inventory of the estate all reference to the stock and bonds embraced in the envelopes above referred to was omitted; and it was several months after the admission of said will to probate before the plaintiff took any steps in the way of an assertion that the purported gifts of stock and bonds by the deceased to her sisters were invalid or ineffectual, or that their acts in converting the same to their own names and uses, upon his initiative and advice, were wrongful. In the course of his testimony upon the trial of this cause the plaintiff stated that there was an understanding with his deceased daughter that the dividends and income from the stock and bonds which he had put into the possession of her sisters, as above set forth, was to be applied to the cost of administering her estate; but there is nothing either in her direction or in his action indicating that this was to be treated as a condition in any way affecting the validity of the gifts themselves—at the most it was only an obligation cast upon the respective donees to apply these revenues to the indicated purpose, and which would have been enforceable against them in an appropriate action at law.

The foregoing are substantially the undisputed facts in the case, and the sole question which was presented to the trial judge at the time he granted the defendant's motion for an instruction to the jury to find a verdict in her favor, was the question as to what construction should be placed upon the writing of the deceased upon the brown paper wrapper about the envelopes which contained the decedent's proposed disposition of that portion of her estate; and the sole question presented here is as to whether it was the province of the trial court or of the jury to construe that writing and to deter-

mine therefrom whether the decedent intended thereby to change the earlier arrangement entered into with her father, and to revoke his agency to make a delivery of the respective envelopes by which her wishes as to the disposition of those portions of her property embraced therein were to be given effect.

It is to be observed that the writing of the deceased upon the brown paper wrapper, which inclosed the other and directed and indorsed envelopes, and their respective inclosures, is ambiguous and uncertain on its face; and that it becomes more so when considered in connection with said inclosures. It reads "In case of my death to be opened only by Robert Bragg, Sr., or Rebecca Bragg Martenstein. . . ." It is first to be noted that the word "only" is clearly a limitation upon the persons who might open the package and not upon the time when it was to be opened. It is also to be noted that nothing is therein said or intimated as to what is to be done with the envelopes or their contents within the wrapper, when opened, and that no direction is given as to their delivery to any person or persons by those who were to open it. Neither did the inclosures contain any such direction. This absence of any instruction as to the delivery of the inclosed documents is highly important and significant, as bearing upon the interpretation of the writing on the wrapper and the real purpose and intent of its writer, for it indicates that she did not have the idea of the delivery of the papers in mind in making this writing, and hence that she did not intend thereby to change whatever previous direction she may have given respecting the delivery of the inclosed envelopes. To adopt any other view is to place an interpretation upon this writing which would render ineffectual and abortive her every other intent and act as expressed in the writings within the wrapper, and in this connection it is important to note that the writing upon the outside of the wrapper and the writings upon and within its inclosures were made contemporaneously and as parts of the same transaction by the decedent, and are to be construed together. (Civ. Code, sec. 1642.) When so construed it becomes all the more apparent that the writing upon the wrapper cannot have any reference to the delivery of the papers within it with a view to the time of their taking effect, for otherwise it would defeat and render void every purpose for which these papers were

prepared and indorsed and inclosed within their respective envelopes, and it is a cardinal rule of construction that no part of a writing or of several contemporaneous writings is to receive an interpretation which would render it or them unlawful, inoperative, indefinite, unreasonable, and incapable of being carried into effect. (Civ. Code, sec. 1643.) Such would be the inevitable effect of interpreting the writing upon the outside of this wrapper to mean either that the opening of the package or the delivery of the inclosed papers was to be postponed until after the death of the person who prepared them. It is the much more consistent and reasonable interpretation that it was merely the writer's intention that if for any reason the inclosed documents were not delivered before her death, in accordance with her other arrangements in that regard—as for instance, they might not be, by reason of the suddenness of her decease—that then and in that event they should pass into the hands only of those whom she had designated in her contemporaneous will to be the executors of her estate. It was a legal duty cast upon the trial court to place such an interpretation upon the obscure direction of the writing upon the outside of this wrapper as would not only give a reasonable effect to what the writer intended by it, but in so doing, would also render effectual and valid the intent and purpose of the writer as expressed in its inclosures. In order to do this, it was the province of the court to have recourse to the circumstances under which these several contemporaneous writings were made, as disclosed by the undisputed evidence in the case. (Civ. Code, sec. 1647.) It is also a rule of construction and of practice that, when a writing requires explanation and when the circumstances surrounding its creation, as disclosed by the evidence, are undisputed, it becomes a question of law for the court and not a question of fact for the jury to determine what the proper construction of the writing should be. In this case, the undisputed facts as disclosed by the plaintiff himself, show that it was the lifelong purpose and intent of his daughter that her four sisters should be invested with the ownership of the respective shares of stock and bonds which were inclosed in the envelopes respectively indorsed and directed to them, and that this should be done by the delivery of such envelopes to the persons to whom they were directed when it became apparent to her father that she was about to die; and that he was to be and

act as her agent in the execution of this purpose; that no intent on the part of his daughter to change this plan or revoke this agency was ever manifested by her to him during her life, although they were living at all times together in the utmost of mutual harmony and confidence, which relations also at all times embraced the beneficiaries of her intended gifts. These undisputed facts surrounding these ambiguous writings of the deceased were before the court when the motion of the defendant for an instruction to the jury to return a verdict in her favor was made, and we think it was the province of the court, as a matter of law, to determine the intent of the deceased as disclosed by her writings and explained by this evidence, and to instruct the jury accordingly, and that the court committed no error in its instruction.

There are certain other alleged errors of the court during the trial of the cause, but they are not of sufficient importance to merit consideration here.

The judgment and order denying plaintiff's motion for a new trial are affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 26, 1914.

[Civ. No. 1249. Third Appellate District.—July 28, 1914.]

**ALEXANDER ALLEN, Respondent, v. LOS MOLINOS
LAND COMPANY (a Corporation), Appellant.**

DAMAGES—BREACH OF CONTRACT TO SUPPLY WATER FOR IRRIGATION—

LOSS OF CROP—SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS.—

In this action to recover damages for breach of contract by the vendor of land to furnish the vendee water for irrigation, resulting in the loss of the latter's potato crop, the findings as to the preparation of the land for planting, as to the time when it was ready to receive water, as to the arrest of the growth of the potatoes by reason of the lack of water, and that when water finally was furnished it was too late to save the crop, are supported by the evidence.

ID.—MEASURE OF DAMAGES—VALUE OF CROP LESS COST OF GROWING AND MARKETING.—The correct measure of damages in such case is the market value of the potatoes at the selling place, less the expenses incurred in growing and marketing the crop; under the rule of section 3300 of the Civil Code that where an action is for the breach of an obligation arising from contract, the measure of damages "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom."

ID.—FINDINGS AS TO DAMAGES—INTERPRETATION—WHETHER SUPPORT JUDGMENT.—A finding by the court in such case that the cost of producing and marketing the crop "would have been the sum of \$129.00, and that the net damage accruing to the plaintiff, to wit, the value of the crop that would have been produced less the said sum of \$129.00 was as great as \$700.00," is not a finding that the value of the crop was seven hundred dollars, but that its value was a sum equal to at least seven hundred dollars, after deducting \$129.00, and it supports the judgment for seven hundred dollars.

ID.—EVIDENCE TO SHOW THAT FURNISHING OF WATER WAS INDUCEMENT TO CONTRACT.—It is not error to admit testimony in such action that the agreement that water was to be furnished for irrigation was an inducement to purchase the land.

ID.—AMENDMENT OF PLEADING DURING TRIAL—DISCRETION OF TRIAL COURT—REVIEW ON APPEAL.—The allowance or disallowance of an amendment in the midst of a trial is within the discretion of the trial court, and its ruling will not be disturbed on appeal unless such discretion has been abused.

ID.—AMENDMENT OF ANSWER SO AS TO SHOW ABILITY TO FURNISH WATER—WHEN PROPERLY REFUSED.—It is not an abuse of discretion in such an action for the court to refuse to permit the defendant, during the trial, to amend its answer by alleging that it could have put its ditches into condition to furnish the plaintiff with water if demand therefor had been made, where the complaint alleges that the defendant had not completed the canals and was not in a condition to deliver water and the answer does not deny the allegation.

ID.—NOTICE TO CORPORATION OF AVERMENTS OF COMPLAINT WHERE ITS OFFICER VERIFIES ANSWER.—If the answer was verified by the superintendent of the defendant corporation, it is charged with notice of the averments of the complaint and cannot claim surprise at the trial when a case is made in accordance with the pleading.

ID.—NEW TRIAL—MENTAL CONDITION OF ATTORNEY AS GROUND.—A trial court does not err in denying the defendant a new trial on the ground that its attorney was afflicted with brain trouble at the time he prepared its answer, where it appears that, although the attorney died shortly afterward suffering from such malady, he exhibited his usual mental vigor in attending to other legal matters at the time of his alleged mental impairment.

APPEAL from a judgment of the Superior Court of Tehama County and from an order refusing a new trial. John F. Ellison, Judge.

The facts are stated in the opinion of the court.

McCoy & Gans, for Appellant.

W. P. Johnson, for Respondent.

CHIPMAN, P. J.—This is an action for damages under a written contract, made part of the complaint, whereby defendant was to sell and plaintiff was to buy certain 12.54 acres of land, and, among other agreements, plaintiff was entitled to receive from the Coneland Water Company, organized for the purpose of irrigating the lands of defendant and others, "one-fifth miner's inches per acre, at such times and places and subject to such rules and regulations" as may be prescribed by said Coneland Water Company, and for which water plaintiff was to pay two dollars per acre annually. Both said companies were under the management of one and the same person. It is alleged in the complaint that the irrigating season was by a rule of said Coneland Water Company declared to be from April 1st to October 31st of each year, and said rule was in force from and after April 1, 1912; "that one of the chief inducements of plaintiff to enter into said contract was the provision in said contract in respect to furnishing water for said land" (Par. V); that about March 18, 1912, plaintiff had all of his said land planted to potatoes; that said land was prepared for said planting in a farmerlike manner and agreeably to the custom of good husbandry, and that the soil of said land was suitable for raising large crops of potatoes with proper irrigation, and said contract provided for a supply of all the water necessary for the land for such purposes (Par. VI); that about April 15, 1912, "said potatoes so planted were growing nicely and gave promise of making a good crop, but from said date were in need of water for irrigation thereof. That between said date and the 18th day of May, 1912, the growth of said potatoes was arrested because of lack of water, and between said dates said potato crop was continuously in need of water for irrigation thereof." (Par. VII); "that the defendant and said Coneland Water Com-

pany had not had their canals and irrigating ditches in proper condition for the furnishing of water for the said land in accordance with said contract, and that said canals and irrigating ditches were not constructed and prepared so the water could be delivered upon the said land until the 18th day of May, 1912, when the water was furnished by said companies to plaintiff for his said land. That no provision had been made by the said companies by which water could have been furnished and delivered to plaintiff for the irrigation of his said land at an earlier date than the said 18th day of May, 1912" (Par. VIII); "that by reason of the failure of said companies to furnish water between said dates, the growth of said potatoes was arrested, and when water was delivered to the plaintiff for the said crop as set forth herein, it was too late to save said crop from being a total loss"; that plaintiff depended upon defendant to furnish water for said purpose and by reason of its failure so to do said crop was a total loss (Par. X); that by reason of the foregoing plaintiff has been damaged in the sum of seven hundred dollars (Par. X). Damages are also claimed for the cancellation by defendant of said contract, because of plaintiff's failure to pay installments due thereunder, which failure it is alleged resulted from the failure to raise said potato crop. As the court found against plaintiff on this issue and as plaintiff does not appeal, this branch of the case need be no further noticed.

The complaint and answer are verified. Defendant denied, on information and belief, the averments in paragraph V of the complaint; denied the averments of paragraph VI as to alleged proper planting and preparation of the land, but admits its suitability for growing potatoes and alleges that said land was not ready to receive water nor properly prepared prior to May 18, 1912. The averments of paragraphs VII and VIII are admitted by not denying them. Defendant denies the averments in paragraphs IX and X. The answer was verified by Thomas H. Means, the general manager of the companies.

The court found paragraphs I to IX, inclusive, of the complaint to be true and "That plaintiff was ready and his land was prepared to receive water earlier than May 18, 1912, and plaintiff was so ready and his land was so prepared in time to have prevented the loss of his crop, if water had been fur-

nished by defendant." The court also found that plaintiff was damaged "in a sum equal to what the value of the said potato crop would have been if water had been furnished, less the additional costs and expenses that would have been incurred in taking care of, harvesting and selling said crop" which the court found was one hundred and twenty-nine dollars, "and that the net damage accruing to the plaintiff, to wit, the value of the crop that would have been produced less the said item of \$129.00 was as great as the sum of \$700.00."

Judgment accordingly passed for plaintiff for seven hundred dollars from which and from the order denying its motion for a new trial defendant appeals.

1. The findings as to the preparation of the land for planting; that the land was ready to receive water earlier than May 18, 1912; that the growth of the potatoes was arrested by reason of the lack of water, and that when water finally was furnished it was too late to save the crop, are challenged as unsupported by sufficient evidence.

Plaintiff testified that the soil is rich loam well adapted to the growing of potatoes, which defendant admitted; that he prepared the land by deep plowing and sufficient harrowing agreeably to the requirements of good husbandry; that he bought his seed from Oregon of approved varieties, in good condition, and planted it in accordance with approved methods of planting; that the seed came up and showed healthy and promising growth; that in due time he hoed and "hilled up" the earth against the vines in proper manner and kept the ground cultivated to retain moisture and promote further growth. He testified: "That spring was a very dry year, and there was a great lack of rain. There was a very long dry spell, at the end of which there was a very hot north wind, and after that there was a very heavy rain storm, after this dry spell, and which soaked the ground very thoroughly. This was May 19th. This was the day after the water was delivered." He testified that he examined the vines at this time and "a second growth" appeared which he learned later had rendered the crop of no value. He testified that up to May 1st the potatoes seemed to be doing well, but the continued dry weather and lack of moisture which irrigation would have supplied was the apparent cause of the "set back" which the potatoes received. He testified that after water was furnished there was no lack of moisture, but noth-

ing could then have saved the crop. There was corroborating testimony of some of the essential facts testified to by plaintiff. Defendant introduced witnesses whose testimony tended in some degree to dispute the correctness of plaintiff's testimony, but all that we are at liberty to say of it is that it created a conflict which it was for the trial court to deal with. Its findings have sufficient support and must stand as presenting the ultimate facts in the case.

2. The evidence was that under favorable conditions "it was a poor year for potatoes." There was testimony that such land as plaintiff's "ought to raise nothing less than 50 sacks per acre, and ought to bring as high up as 150 sacks." Plaintiff in his testimony said that he "was figuring on 50 sacks to the acre of 120 pounds to a sack." He gave the market price of the two varieties he planted at the time they should have matured and have been ready for market, also the cost of producing and marketing the crop, or, as the court expressed it, the market value of the potatoes less "costs and expenses that would have been incurred in taking care of, harvesting and selling said crop." With these facts before it, and the acreage planted, the court arrived at what we think was the correct measure of damages, to wit, the market value of the potatoes at the selling place, which the testimony showed was Red Bluff, less the expenses incurred in growing and marketing the crop. The action is for the breach of an obligation arising from contract, and the measure of damages "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." (Civ. Code, sec. 3300.)

It is claimed that the finding as to the damages does not support the judgment, and properly construed means seven hundred dollars less one hundred and twenty-nine dollars, to wit, five hundred and seventy-one dollars, and not seven hundred dollars as entered in the judgment. The court found the cost of producing and marketing the crop "would have been the sum of \$129.00, and that the net damage accruing to the plaintiff, to wit, the value of the crop that would have been produced less the said sum of \$129.00 was as great as \$700.00." This is not a finding, as defendant contends, that the value of the crop was seven hundred dollars, but that its value was a sum equal to at least seven hundred dollars after

deducting one hundred and twenty-nine dollars, and supported the judgment for seven hundred dollars. A simple calculation of fifty sacks of one hundred and twenty pounds each at $1\frac{1}{4}$ cents per pound, the lowest market price named, would give a net value greater than the sum allowed.

3. Error is claimed because plaintiff was permitted to testify that the agreement that water was to be furnished for irrigation was an inducement to purchase the land. One of the conditions of the contract of sale was that plaintiff should receive one-fifth miner's inches of water per acre on said land. It was not varying the terms of the contract for plaintiff to say that this was an inducement. The contract itself said as much.

4. Plaintiff testified that he was familiar with the rules of the water company and knew there was a regulation that a water user desiring to irrigate should notify the company or its officers, in writing, three days in advance of the time water was needed. "Q. Did you make any demand in writing for the delivery to you of water? A. Not at that time. I was told it was not necessary. Q. When did you make any demand at all, either in writing, or otherwise? Mr. Johnson (plaintiff's attorney): I object on the ground it is incompetent, irrelevant and immaterial. The pleadings admit that the company didn't have the canals completed, and couldn't deliver it (the water) before this particular time (May 18th). What is the use of making demand before they have their canals ready to deliver it? The Court: I will sustain the objection. You allege you were ready to deliver on the 18th of May, and the inference is that you couldn't deliver it before that." The complaint distinctly alleged that the water company had not completed its canals and was not in condition to deliver water before that date which was admitted by not denying it. Objection to a similar question was later on sustained. After some further testimony was taken Mr. Wells, defendant's attorney, asked leave to file the following amendment to the answer: "Furthermore answering the complaint of plaintiff, the defendant admits that the canals and ditches were not in perfect condition to deliver water, but defendant alleges that it could and that it would have put the ditches into condition to furnish any and all of the water needed had demand been made for the same, and defendant alleges that plaintiff or any other person, did not make demand. Defend-

ant further says that it could within a very few days have furnished water after a demand is made. . . . The Court: I will deny the application to amend the answer at this late stage of the case."

The complaint alleges that by the rules of the water company the irrigating season began on April 1st and that the defendant was not prepared to deliver water to plaintiff until May 18th, and the evidence was that the damage became irreparable prior to the latter date. There was no denial that the company was unable to furnish water sooner than May 18th; it was, therefore, immaterial whether or not a demand for water was made. Plaintiff was not called upon to perform the idle act of making a demand concededly impossible of being complied with.

In support of its offer to amend the answer and of its claim that the court erred in refusing to allow the amendment offered, many cases are cited in illustration of the meaning of section 473 of the Code of Civil Procedure, to the effect that amendments to pleadings are favored to enable a party to prove all the facts necessary to this cause of action or defense. (*Crosby v. Clark*, 132 Cal. 8, [63 Pac. 1022], and *San Francisco etc. Society v. Leonard*, 17 Cal. App. 254, [119 Pac. 405], are cited as distinctly so holding. The court is empowered to impose terms where a party is taken by surprise and may even continue the case. While this is true, it is also ruled that the allowance or disallowance of an amendment in the midst of a trial is within the discretion of the trial court, and its ruling will not be disturbed unless such discretion has been abused. (*Manha v. Union Fertilizer Co.*, 151 Cal. 581, [91 Pac. 393]; *Salmon v. Rathjens*, 152 Cal. 290, [92 Pac. 733].) The answer was verified by the superintendent of both companies and defendant is charged with knowledge of the averments of the complaint. The allegation that defendant had not so far completed its canals and ditches as to make it possible to furnish plaintiff's land with water earlier than May 18th, could not have escaped the notice of defendant or its attorney and hence defendant cannot complain that it was surprised. Presumably the averment was not denied because it could not be truthfully controverted, and plaintiff had a right so to assume the fact to be when he went to trial. The proposed amendment gives evidence of hasty preparation and fails fairly to present the issue that defendant was pre-

pared on demand to furnish plaintiff the needed water. The amendment seems to rely on the rule of the water company requiring three days' notice by a water user. The rules of the water company are not in the record, and all we know of this rule is derived from a question on cross-examination of plaintiff by Mr. Wells as follows: "Q. Regulation number three, which says water users desiring to irrigate shall notify the company or its duly appointed officer three days in advance of the time water is needed, and blanks will be furnished by the company for this purpose, and these blanks are to be filled out, giving time water is desired, the length of run desired, and number of inches needed and the water user will then be notified when the water can be delivered to him, and he must be prepared for the delivery—you were familiar with that regulation? A. I was. Q. Did you make any demand for the delivery in writing for the delivery to you of water? A. Not at that time. I was told it was not necessary." It seems to us that this regulation had reference to the delivery of water after the canals and ditches were completed and was designed to aid the company in its distribution of water to many users. The regulation certainly did not mean that the company would construct its canals and ditches upon three days' notice. By its own regulation the irrigating season commenced on April 1st at which time the company should have been ready to deliver water. The proposed amendment does not state clearly or at all that its canals and ditches were in a condition to have furnished water within three days. We cannot say that under the circumstances the court abused its discretion.

5. Upon the motion for a new trial appellant submitted certain affidavits tending to show that at the time the answer was prepared Mr. Wells, appellant's attorney, was afflicted with brain trouble of which he, some time after the trial, died. There were counter affidavits from which the inference was fairly deducible that Mr. Wells had not at the time suffered any perceptible diminution of his mental powers. The record bears evidence that Mr. Wells had his case well in hand, and the trial judge was in a position to observe his capacity intelligently to conduct the defense. We cannot see that the court erred in denying the motion on this ground.

Superintendent Means made affidavit in support of the motion that had plaintiff given notice under rule three of the

water company "said canals and ditches would have been constructed and prepared so that water could have been delivered upon the land of said plaintiff for the irrigation thereof according to said contract, within three days after the giving of such notice," and that the reason said canals and ditches had not been so constructed as to deliver water to plaintiff's land earlier than May 18th was that plaintiff had not given any notice as provided in said regulation three. It will be observed that this statement of the situation is much more specific than is found in the proposed amendment. But it cannot be said nor is it shown that it was through surprise or excusable neglect that the facts were not set forth in the answer. It was still within the discretion of the court to grant or deny the motion and we find no just ground for interfering with its ruling.

It is strongly urged that the mental condition of Mr. Wells was unknown to defendant and came to its knowledge only through the autopsy after his death whence, by *a posteriori* reasoning, his condition at the time of the trial is arrived at. It may be conceded that an incipient stage of brain lesion had developed, but there was evidence that Mr. Wells had returned from treatment at San Francisco, and had resumed work in his office, had, shortly before the trial, assisted in the trial of a case in court, attended to the business of a bank for which he was attorney, and otherwise exhibited his usual mental vigor. Had it clearly appeared without conflict that Mr. Wells was in fact incapable of framing the answer in this case or of conducting the defense and that these facts were unknown to defendant and could not with reasonable diligence have been known to it, a different situation would be presented. We are unable to discover that the trial court abused its discretion.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1244. Third Appellate District.—July 23, 1914.]

H. A. WELLER, Appellant, v. R. M. BROWN et al., Respondents.

DEED—RESERVATION OF STRIP OF LAND FOR EASEMENT—INTERPRETATION OF COVENANT.—Where the grantors of a strip of land are owners of the land on either side of the strip, a covenant in the deed that the strip is not to be used for building purposes, but is to be held by the grantee until the city needs it for a public street, when he will convey it to the city upon payment to him of the amount he has paid the grantors therefor, while not sufficient to effect a dedication of the strip as a public street, is sufficient, as between the parties, to constitute a reservation in favor of the owners of the adjoining lands of such rights as they would have in a public street, and also as a reservation to them of a negative easement prohibiting the erection of any building on the strip.

ID.—FORMER DECISION ON APPEAL—LAW OF CASE.—The former decision on this appeal embodies the law of the case and is controlling on this appeal, although on the second trial the deed was reformed by adding to the covenant, limiting the use of the land to a public street, a contemporaneous oral agreement as to the holding of the land for the city.

ID.—COSTS IN SUIT TO QUIET TITLE—RIGHT OF PLAINTIFF TO RECOVER.—Where the only material issue, in a suit by a grantee of the strip to quiet title, is the existence of an easement in favor of the defendant, as to which judgment is awarded him, the plaintiff, though adjudged to be the owner of the fee, is not entitled to costs.

APPEAL from a judgment of the Superior Court of Mendocino County and from orders refusing judgment on findings and retaxing costs. J. Q. White, Judge.

The facts are stated in the opinion of the court.

Mannon & Mannon, for Appellant.

Preston & Preston, for Respondents.

BURNETT, J.—On June 15, 1906, respondent, Louisa M. Brown, (wife of her codefendant), being the owner of a tract of land in Fort Bragg, Mendocino County, conveyed to appellant by a grant deed a strip sixty feet wide extending across the entire width of her tract and leaving her with a parcel adjoining it on each side, all three parcels fronting on

Main Street. The deed was in the usual form purporting to convey the absolute title, except that it contained the following clause: "It is hereby mutually agreed between the parties of the first part and the party of the second part that the above described land is to be used as a public street and not as a lot for building purposes."

An action was brought by plaintiff to quiet his title to this strip and a judgment was rendered in his favor in the superior court of said Mendocino County, but this was reversed by the supreme court and the cause remanded for a new trial. (*Weller v. Brown*, 160 Cal. 515, [117 Pac. 517].) Before the action was tried again plaintiff amended his complaint, alleging that by reason of a mistake as to the legal effect of the language of said deed it did not correctly express the intention of the parties to the contract, in that it was no part of the agreement that the respondents should have any interest in the land conveyed by them.

By stipulation, the original answer of the respondents was considered as their answer to the amended complaint and it was further agreed that any additional allegations in the amended complaint should be deemed denied.

Afterwards the court found: "III. That the said plaintiff agreed to pay to the said defendants and the said defendants agreed to accept the sum of four hundred and fifty dollars in gold coin of the United States for said lot, and plaintiff agreed not to use said lot for building purposes, but that he would buy it and pay for it and hold it until the city needed it for a street, and when said city repaid him the consideration he was to pay defendants for the land, he would convey it to said city for a public street and that no other or further agreement was made between plaintiff and the defendants herein in relation to said land.

"IV. . . . That plaintiff did not then or there or at any other time or place claim to be acting for, by or on behalf of the public, nor did he take said deed from the defendant Louisa M. Brown for the land in controversy with the understanding or agreement, whether duly or regularly made or otherwise, that the said land in controversy should be or become a public street or highway for public use or travel unless and until the city repaid plaintiff the consideration he paid defendants therefor, or that the same should be or become an easement appurtenant to the remaining lands so owned by

said defendant Louisa M. Brown, whether for the purpose of ingress or egress thereto or therefrom, unless the facts found in paragraph III hereof taken in connection with the situation of the land in controversy as herein found reserved to defendant Louisa M. Brown such rights as a matter of law; that the right to travel or use said land in controversy is not necessary but is convenient for the use or occupation by said defendant Louisa M. Brown of the lands she owns that adjoin the land in controversy.

"V. That at the time of the execution of said deed and thence up to the 7th day of August, 1911, the plaintiff supposed and believed that the said deed expressed the true agreement of the parties thereto, as set out in paragraph III of these findings, but that on said last mentioned day the supreme court of the state of California decided that the language of said deed, as a matter of law, reserved to the said defendants all of the rights in the lot thereby conveyed which they would have were it a public street; that it was never agreed between the parties to said deed that the defendants or either of them should reserve all or any of the rights in said lot which they would have were it a public street, and that the reservation of such rights was inserted in said deed by mistake as to the true legal meaning of the clause thereof in this paragraph above quoted, and that therefore the said deed did not and does not express the true agreement of the parties thereto; unless the facts found in paragraph III hereof taken in connection with the situation of the land in controversy as herein found reserved to defendant Louisa M. Brown such rights as a matter of law.

"VI. That the failure of said deed to express the true agreement of the parties arose from a mistake as to the legal effect of the language contained in said deed and quoted in paragraph V of these findings; that plaintiff at the time of accepting said deed and at all times up to August 7, 1911, supposed that he knew and understood the legal effect of the language used in said deed and that such legal effect was to express the true agreement of the parties as set forth in paragraph III of these findings; that the defendants did not make the same mistake as to the legal effect of said deed as did said plaintiff, but that they and each of them knew of plaintiff's said misapprehension of the law as to such legal effect at the time of executing said deed, but that said defendants did not

nor did either of them at that time or at any other time, rectify plaintiff's said misapprehension of the law.

"VII. That plaintiff was at the time of the commencement of this action, ever since has been and now is the owner, seized in fee, in the possession and entitled to the possession, of all of the lot of land described in paragraph III of these findings, subject to the right of the defendant Louisa M. Brown by virtue of the said deed; that the public at large has no right to travel over or to use the said land in controversy or any part thereof as or for a public street or highway."

As conclusions of law the court found: "That plaintiff is entitled to a decree of this court reforming the said deed so as to express the true intention of the parties thereto by striking therefrom the words 'is to be used as a public street and not as a lot for building purposes,' and by inserting in lieu thereof the words 'is not to be used as a lot for building purposes, but is to be held by the party of the second part until the city of Fort Bragg needs it for a street, and when said city repays said party of the second part the sum of four hundred and fifty dollars, said party of the second part will and shall convey the land hereby conveyed to said city for a public street,' and that said reformation should take effect as of the date of said deed.

"That the defendant Louisa M. Brown is entitled to judgment that she is the owner of an easement for a right of way over the land described in paragraph III of these findings with the right to ingress and egress thereon, being the same rights that she would have in said land in controversy if the same were a public street, and that said easement is appurtenant to the remaining lands of the said defendant.

"That the plaintiff is entitled to a judgment declaring that he is the owner and seized in fee, in the possession and entitled to the possession, of all the land in paragraph III of the findings of fact described, subject to the said right and easement of the said defendant Louisa M. Brown therein, as hereinabove set forth."

While the deed was reformed, as we have seen, there seems to be no appreciable difference in legal effect between the decisive findings here and those at the former trial. Then it was found by the court: "That at the time of the execution and delivery of said deed, and concurrently therewith, the plaintiff verbally agreed with the defendants that he would

pay to them the full value of said land and hold possession of the same. That if the city of Fort Bragg could be induced to buy said land and dedicate it to street purposes, the plaintiff would deed said land to said city upon receipt by him of the amount he paid defendants therefor, and that then, and not till then, the same might become a public street.

"That no further or other agreement was ever had or entered into between the plaintiff and defendants or between plaintiff and either of the defendants respecting the lands in controversy or the use thereof."

The deed itself provided that "the above described land is to be used as a public street and not as a lot for building purposes." In reforming the deed, however, the court added to the above-mentioned covenant virtually said oral agreement, so that the deed now contains substantially and almost identically the language of the former written and also the oral covenant as to the use of the land. In other words, the whole agreement was formerly set forth, partly in the deed and partly in parol, but now it appears in the deed itself. The meaning and effect, however, of the completed covenant have not been changed and no different construction of the contract of the parties is permissible.

But in the opinion of the supreme court in the former appeal, written by Mr. Justice Sloss, it was said: "The question to be decided is whether the deed read in connection with these circumstances existing at the date of its execution, reserved to the grantors any interest in the land conveyed," and, after considering the nature of said restrictive covenant in the deed, the opinion proceeds: "Apart, however, from the various considerations above suggested, there still remains a way by which the restrictive words of the deed may be given effect, that is, by construing them as intended to reserve an easement in the land granted for the benefit of the remaining and adjoining land of the grantors," and the court holds that this is the natural and reasonable conclusion to be drawn from the facts found and that, while the agreement would not of itself effect a dedication of the strip as a public street, it was sufficient as between the parties "to constitute a reservation in favor of the owners of the adjoining land of such rights as they would have in a public street, and further to reserve to them a negative easement prohibiting the erection of any

building upon the strip." As to the effect of said oral agreement, which is now a part of the deed, it was declared that "it shows no more than that an immediate dedication to the public was not contemplated" and that it "may be given full effect without setting aside the covenant restricting the grantee's use of the land pending a purchase by the city."

We look upon this decision of the supreme court as embodying the law of the case and controlling on this appeal.

The findings, as set forth, may be lacking somewhat in precision, but, when properly understood, we think there is no irreconcilable conflict. The declaration "that it was never agreed between the parties to said deed that the defendants or either of them should reserve all or any of the rights in said lot which they would have were it a public street," etc., is modified by the concluding clause of the finding, and, manifestly, means that there was no *express* agreement to that effect.

It is to be observed in this connection that there is no finding that it was not the *intention* of the parties or either of them that the grantors should reserve any rights in the premises. If there were, some embarrassment might be met in the effort to affirm the judgment.

The finding as to the mistake of the grantee means, as we understand, that he believed the covenant as incorporated originally in the deed had the same significance as that now embodied therein by order of the court. The legal effect, however, of the agreement of the parties not having been changed we can see no vital importance in this consideration.

The point is made by appellant that even if the court below properly construed the deed, costs should have been awarded plaintiff, under the authority of *Petitpierre v. Maguire*, 155 Cal. 242, [100 Pac. 690], wherein it was held that, under section 1022 of the Code of Civil Procedure, plaintiff was entitled to his costs, it appearing that he was the owner of the land in fee, the defendant having taken issue as to such title. *Sierra Union etc. Co. v. Wolff*, 144 Cal. 430, [77 Pac. 1038], and *Gibson v. Hammang*, 145 Cal. 454, [78 Pac. 953], were therein cited in support of the ruling.

In the former of these it was held that "where the plaintiff has any judgment in his favor in an action to quiet title,

though it be for only a part of the property, and though the defendant has judgment in his favor for the residue, the plaintiff is entitled, under the terms of the statute, to recover his costs, as of course."

In the Gibson case the action was to annul a deed made by a testatrix in her lifetime to defendant and was brought by the heirs at law who were devisees under the will, and it was held that it was an action involving the title to the land in question and that plaintiffs were entitled to their costs since they recovered part of the property sued for.

We do not think, however, that these cases are controlling here.

Construing the answer as a whole, we find that the only material issue was as to the existence of the easement in favor of defendant Louisa M. Brown, for a right of way and as to this the judgment was in favor of said defendant. There would be, therefore, as much reason for invoking section 1024 of the Code of Civil Procedure in favor of said defendant as said 1022 in favor of plaintiff. At any rate, we think the court was justified in striking out plaintiff's cost-bill. The judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1233. Third Appellate District.—July 28, 1914.]

CHARLES A. TABER et al., Respondents, v. PIEDMONT HEIGHTS BUILDING COMPANY (a Corporation), Appellant.

VENDOR AND VENDEE—MISTAKE AS TO LAND PURCHASED—RESCISSION BY VENDEE.—Where intending purchasers of city property visit the premises with the vendor's agent and indicate to him the particular parcel they will purchase and also land they will not purchase, and, upon his mistaken statement that the property they desire is lot number 35, they purchase the lot bearing that number when as a matter of fact such lot embraces a portion of the tract which they have specifically rejected, they are entitled to rescind their purchase.

ID.—SPECULATIVE CONTRACT—EFFECT OF MISTAKE.—In such case the rule does not apply that where parties knowingly enter into a speculative contract or transaction, one in which they intentionally speculate as to the result, and there is an absence of bad faith, violation of confidence, misrepresentation, concealment, or other inequitable conduct, the contract is binding, notwithstanding the mistake of one of the parties.

ID.—RISK OF CONTRACT TURNING OUT IN CERTAIN WAY—RELIEF AGAINST EVENT.—Nor does the rule apply that where each of the parties to a contract is content to take the risk of its turning out in a particular way, chancery will not relieve against the event.

ID.—RESCISSION BY VENDEE—INTEREST—FROM WHAT TIME TO BE COMPUTED.—In an action by such vendees for rescission on the ground of mutual mistake, interest should be allowed only from the date of rescission, there being no allegation of fraud or willful misrepresentation.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. Wm. S. Wells, Judge.

The facts are stated in the opinion of the court.

Fitzgerald, Abbott & Beardsley, for Appellant.

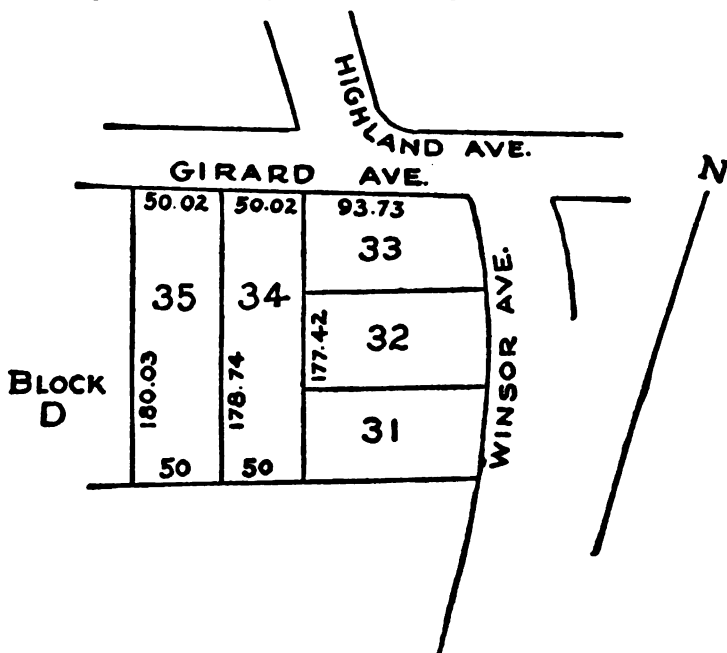
L. D. Manning, for Respondents.

CHIPMAN, P. J.—This is an action for the rescission of a contract for the purchase of a certain lot designated as lot 35 in block D upon defendant's map of Piedmont Knoll, Oakland, and to recover judgment for the money paid on account of said purchase. Plaintiff had judgment as prayed for from which, and from an order denying its motion for a new trial, defendant appeals.

The pleadings are verified and most of the material averments of the complaint on which plaintiff relies were denied in the answer. As the findings follow quite closely the averments of the complaint the issues will sufficiently appear from the findings of fact, which we proceed to state.

Plaintiffs are husband and wife. Defendant was, at all times mentioned in the complaint, the owner of lots 34 and 35 in said block D, and one Andrew McFarland was defendant's agent with authority "to exhibit the lands and negotiate

agreements of purchase of the lands of defendant." The following sketch of part of block D is necessary to an understanding of the findings and testimony in the case:



On May 10, 1910, plaintiffs inspected the land under the direction of McFarland, "as agent of defendant, for the purpose of selecting, and plaintiffs did then and there select a piece of land and did inform Andrew McFarland as agent for defendant that they selected and would purchase the piece of land on which they then stood; that plaintiffs were at that time unfamiliar with the designations and descriptions of the land, and Andrew McFarland as agent of defendant with intent to induce plaintiffs to purchase a piece of land, paced the distance from a point which he stated to plaintiffs was the probable line of Winsor Avenue and stated the distance to be about 143 feet from Winsor Avenue, and walked over the piece of land so selected by plaintiffs and pointed out to plaintiffs the approximate boundary lines thereof and exhibited to plaintiffs printed copy of the map of Piedmont Knoll and stated to plaintiffs that such piece of land so selected by plaintiffs was designated on said map as lot No. 35 in block 'D.' At that time a person unfamiliar with the

land could not determine the true line of Winsor Avenue or the true lines as designated on the map of the land selected by plaintiffs from an inspection or examination of the land. The plaintiffs relied solely upon such representation of Andrew McFarland and from such recommendations believed that the land selected by them was designated and described as lot 35, block 'D,' on the above mentioned map and were solely induced thereby to execute the contract admitted in evidence, made and entered into on May 10, 1910, and following the selection of such land, by the terms of which contract plaintiffs agreed to purchase and defendant agreed to sell" the lot above described as lot 35. "That on or about September 29, 1911, plaintiffs were informed by said Andrew McFarland as agent for defendant that a mistake had been made in the description of the piece of land selected by plaintiffs and that lot numbered 35 did not designate the land intended to be sold by defendant to plaintiffs and did not include the land selected by plaintiffs. That plaintiffs thereupon demanded that defendant convey to them the piece of land so selected by plaintiffs, but defendant refused on such demand to convey the land so selected. That the land selected by plaintiffs lies on the side of a knoll or raise at and above the level of the street and of the surrounding land, excepting a small part in the rear of the lot, and it is desirable for a residence site, while lot number 35 lies adjoining and almost wholly in a hollow or depression below the level of the street and of the surrounding land, is partly filled ground and is less desirable and is of less value for a residence site than the land selected by plaintiffs. The greater portion of the land selected by plaintiffs would be in lot No. 34 and a small portion in lot 35 of said block D. That at the time of executing such contract of purchase plaintiffs and Andrew McFarland believed the land described in such agreement as lot numbered 35 was identical with and was the proper description of the piece of land selected by and designated by plaintiffs to Andrew McFarland, as agent of defendant, as the land plaintiffs desired to purchase, and plaintiffs had no knowledge to the contrary until so informed by said Andrew McFarland on or about September 29, 1911. That plaintiffs would not have purchased said lot No. 35 nor have entered into such contract of purchase had they not relied upon and acted upon such representations of Andrew

McFarland that plaintiffs were purchasing and entering into an agreement to purchase the land selected by plaintiffs. On October 2, 1911, plaintiffs notified defendant that they rescinded the agreement for the purchase of the land designated as lot No. 35 and plaintiffs offered to restore to defendant everything of value received under the contract by plaintiffs and did tender a transfer in writing executed by plaintiffs conveying and releasing to defendant all interest held by plaintiffs in lot No. 35. That plaintiffs performed all the covenants of the agreement of purchase on their part to be performed and paid \$738.48 taxes and installments under the terms of the agreement. The interest accruing on the sum of \$738.48 computed from the dates of the payment of the several installments up to October 2, 1911, the date of rescission, is found to be \$55.93, and the additional sum of \$25.44 interest computed from October 2, 1911, to this date. The allegations of the answer are untrue, except as above found."

As conclusions of law the court found: "That the consent of plaintiffs to the above mentioned contract was not mutual; that plaintiffs did not purchase the land now known to be designated and described as lot number 35 in block 'D' on said map, and that the designation in the contract of the land to be purchased as being lot number 35 was agreed to by plaintiffs in the sense of being a description of the parcel of land indicated by plaintiffs to defendant at the time of selection as being the land they intended to purchase. That on October 2, 1911, plaintiffs rescinded such agreement as to lot number 35. That plaintiffs are entitled to judgment as prayed for in the complaint upon conveying to defendant all interest received or held by them in lot No. 35 above mentioned."

Defendant presents but two questions in its brief. First: "Can a purchaser of a city lot rescind the purchase upon the ground of mistake in location, when he knew at the time of the purchase that he did not know the location, except approximately; in other words, is section 1577 of the Civil Code to be extended and enlarged so that mistake can be predicated on *conscious* ignorance of a material fact, as well as upon *unconscious* ignorance?" Second: Where there is no fraud, oppression or malice, is it proper in a suit for rescission to charge interest from the date of payment on the land, and before the plaintiff has elected to rescind and while he is still making his payments and treating the contract as subsisting?

Defendant does not in its brief attack the findings of fact as unsupported by the evidence; indeed, its points are based upon the findings. The argument proceeds upon the assumption that rescission is sought on the ground of mutual mistake which section 1577 of the Civil Code defines "as an unconscious ignorance or forgetfulness of a fact," while it is claimed that "all the evidence shows that the ignorance was conscious ignorance" of the location of the lot. "And there being no *unconscious* ignorance of that material fact, but rather a *conscious* ignorance, there was no mistake at all entering into the contract. The contract was based upon facts that were known to be doubtful. The plaintiffs knowingly made a speculative contract, and now cannot allege mistake simply because they speculated upon the location of the lot and do not now know and never knew its exact location."

Defendant brings to its aid the rule as stated in 9 Cyc. 398: "Where the parties treat upon the basis that the fact is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract will be valid, notwithstanding any mistake of one of the parties." The rule is elaborated in 2 Pomeroy on Equity Jurisprudence, sec. 855, quoted in *Colton v. Stanford*, 82 Cal. 351, 388, 389, [16 Am. St. Rep. 137, 23 Pac. 16]. The cases put by Mr. Pomeroy presuppose "an arrangement based upon uncertain or contingent events purposely as a compromise of doubtful claims arising from them, and where parties have knowingly entered into a speculative contract or transaction—one in which they intentionally speculated as to the result—and there is in either case an absence of bad faith, violation of confidence, misrepresentation or concealment or other inequitable conduct." "In such classes of agreements and transactions," says the learned author, "the parties are supposed to calculate the chances, and they certainly assume the risks, breach of confidence, misrepresentation, culpable concealment, or other like conduct amounting to actual or constructive fraud." Defendant still further relies upon the rule as stated in *Ashcom v. Smith*, 2 Pen. & W. (Pa.) 211, [21 Am. Dec. 437], where acreage was estimated. The court said: "Equity will indeed relieve against a plain mistake, as well as against misrepresentation and fraud. But can mistake be alleged in a matter which was considered doubtful, and treated accordingly? Where each of the parties is con-

tent to take the risk of its turning out in a particular way, chancery will certainly not relieve against the event."

The difficulty we find is in applying these very sound equitable principles to the evidence and findings of fact in the present case. The testimony of both plaintiffs, corroborated by friends who were present when they all went together with Mr. McFarland to view the lot, is very clear that plaintiffs distinctly pointed out to McFarland the particular piece or parcel of land and no other that they were willing to purchase which turned out to be lot 34 instead of lot 35. They as distinctly told McFarland that they would not purchase the land which all present saw lay west of the land selected and "down in a swale or draw," some twenty-five feet below the street grade. Plaintiff Charles A. Taber testified: "He, McFarland, had his map with him and he said the corner lot which faced east and the key lot (34) immediately back of it, according to his map, were sold, but he said 'This lot here'—of course, while he had his map, and the numbers on it, I didn't pay any particular attention to the numbers because I was looking at the ground and noticing the topography of it and he stepped it off in a way. He said 'Now this lot is 50 by 178 feet' and I said 'Does any of it go down in that swale or draw?' He says 'No, not a bit of it, the west line of the lot as you will see, is right along the edge of it.' Well, I went to stepping it off. He says 'It is 140 feet from the corner lot but I can't locate the corner very well as the road has not been laid out as it should be, and we haven't the lines yet.' Well he paced it off and seemed satisfied with it and I saw him go down into the fill just below the western edge of this high ground. I said 'Now, we don't want to go down there at all.' He said, 'No, you are not coming down here at all.' And we were very well satisfied with it; we agreed on the terms, and got into the machine and drove back home. He wrote out a receipt for the money that we were to pay at that time, and I thought no more about it, leaving it entirely to Mrs. Taber." Mrs. Taber testified: "About the 10th of May, 1910, we all went out with Mr. McFarland in the automobile, Mr. Taber and Mr. Neece and my daughter and myself, and Mr. McFarland showed us the lot, and we said immediately that we would like that lot there, but we did not want the one in the hollow, that we wouldn't have it under any consideration. Mr. McFarland said 'We are

standing right on the lot.' And we walked to the back of the lot and all around, and we said 'Are you sure this is the right lot?' and he said 'Yes.' I saw them pacing it off but I didn't know anything about pacing." Some montas later, Mrs. Taber thought it was in February, she went to McFarland's office to pay her monthly installment and said "Mr. McFarland, I think there is some mistake about the lot. He says, 'Oh, Mrs. Taber, don't worry, it is all right.' I says, 'Mr. McFarland, is it on the top of the hill, on the very ridge?' and he said, 'Yes.' I says, 'It is not the one in the hollow, is it?' and he says, 'No.' It was along in February, I guess, that we had this conversation. The first time I asked him to go out and see about it, and he said for me to go, he said for me not to worry." At another point in his testimony Mr. Taber testified: "From our standpoint the lot that we selected was the only one of the two that we would care to consider at all. We made that point very clear to Mr. McFarland. I was standing on the fill just to the west of the lot we were selecting and looking at and I told him that we didn't want to go down there at all under any circumstances. He says, 'No, your line is just east of this.'"

It is very certain that plaintiffs did not believe that they had "knowingly entered into a speculative contract or transaction—one in which they intentionally speculated as to the result," a condition which Mr. Pomeroy says is essential to the application of the rule relied upon by defendant. Nor was this (the location of the lot) "a matter which was considered doubtful and treated accordingly, where each of the parties" was "content to take the risk of its turning out in a particular way," as was essential to the rule given in *Ashcom v. Smith*, 2 Pen. & W. (Pa.) 211, [21 Am. Dec. 437].

Much reliance is placed by appellant upon the finding 10, "that at the time of executing such contract of purchase plaintiffs and Andrew McFarland believed the land described in such agreement as lot number 35 was identical with and was the proper description of the piece of land selected by and designated by plaintiffs to Andrew McFarland, as agent of defendant, as the land plaintiffs desired to purchase." McFarland's belief may acquit him of intentional misrepresentation or fraud and we think the finding should be so understood, but as the sales agent of defendant his belief does not acquit him of having sufficient knowledge or means of

knowledge as to the location of the subdivided tracts he was selling to warrant his giving the assurances on which plaintiffs founded their belief and on which they relied and paid their money. The finding that they believed that they were getting the land they selected and pointed out to McFarland is entirely consistent with the finding that they were acting upon his confident assurance rather than upon any belief they may have had, and the evidence in no wise tends to show that as to the location of the lot they were intentionally speculating or that they were taking the risk of getting the piece of land they selected. Plaintiffs had a right to rely upon the representations of defendant's agent "and the vendor cannot escape responsibility by showing that the purchaser might have ascertained that such representations were untrue." (*Morris v. Courtney*, 120 Cal. 63, [52 Pac. 129].)

The court made a finding of unpaid accrued interest to the date of rescission, to wit, \$55.93, and interest computed from date of rescission to date of the judgment, to wit, \$25.44. There is no allegation in the complaint of fraud or willful concealment or misrepresentation of facts and there is no such finding. The court found that McFarland believed that the land selected by plaintiffs was the land intended in the contract. In this he was mistaken but, so far as appears, honestly mistaken. There was no rescission until October 2, 1911, and it seems to us the rule warrants no interest prior to that date. It is true that section 3288 of the Civil Code, provides that, "In every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." We find nothing in the pleadings, evidence or findings justifying the claim that any one of these elements entered into the transaction. *Kiger v. McCarthy Co.*, 10 Cal. App. 308, [101 Pac. 928], bears no resemblance to the case here; nor does *Morris v. Courtney*, 120 Cal. 63, [52 Pac. 129]. There was nothing due plaintiffs from defendant until they rescinded and the action then was for money had and received and not on the contract. In the absence of an agreement to pay interest, the law only awards interest upon money from the time it becomes due. (Civ. Code, sec. 1917; *Hayt v. Bentel*, 164 Cal. 680, [130 Pac. 432].) The error may be corrected upon the appeal from the judgment inasmuch as it clearly appears from the findings and may be corrected by an amendment to the judgment.

Interest prior to October 2, 1911, will be stricken out of the judgment and otherwise the judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1236. Third Appellate District.—July 28, 1914.]

W. S. BRITT, Respondent, v. EAST SIDE HARDWARE COMPANY (a Corporation), Defendant and Respondent; C. E. KINARD, Intervener and Appellant.

INTERVENTION—ORDER DISALLOWING—APPEAL—BILL OF EXCEPTIONS—AUTHENTICATION OF RECORD.—While an order disallowing an intervention amounts in legal effect to a final judgment as to the proposed intervener, yet where an appeal is taken from such order, the record thereon must be authenticated by a bill of exceptions containing all the papers and documents used in that particular proceeding and upon which the trial court acted in making the order.

ID.—JUDGMENT-ROLL—CERTIFICATION OF RECORD.—It can hardly be said that there is, within the contemplation of section 670 of the Code of Civil Procedure, a judgment-roll in a proceeding on a motion for leave to intervene in an action, where the motion has been denied, and hence the certificate of the clerk of the trial court that "the foregoing is a true copy of the transcript of the judgment-roll in the above entitled cause," is not an authentication of the record on the motion.

ID.—AUTHENTICATION OF RECORD—METHOD PRESCRIBED BY RULE OF SUPREME COURT.—The only proper method for authenticating a record on an appealable order is by a bill of exceptions, as required by rule XXIX of the supreme court.

ID.—ABSENCE OF PLEADINGS OF ORIGINAL PARTIES FROM RECORD—PRESUMPTION.—Where the record on appeal from an order disallowing the application of a stockholder to intervene in an action brought against his corporation does not show the pleadings of the original parties, the appellate court will assume that no legal ground or reason was presented for the intervention sought.

ID.—POSITION OF APPELLATE COURT—AFFIRMANCE OF ORDER.—In the absence from the bill of exceptions of the pleadings of the original parties, it is impossible for the appellate court to determine whether the proposed intervention appertains to the same transaction or the alleged cause of action upon which the action is founded, or whether the appellant is interested in the subject matter of the litigation

and entitled to intervene, or whether he has presented any different or further facts than those set up in the defendant's answer, and the order will be affirmed.

APPEAL from an order and judgment of the Superior Court of Alameda County disallowing an application for leave to intervene. William H. Waste, Judge.

The facts are stated in the opinion of the court.

C. E. Kinard, *in pro. per.*, for Appellant.

Beardsley & Kennedy, for Plaintiff and Respondent.

Howard K. James, for Defendant and Respondent.

HART, J.—This is an appeal from an order and judgment disallowing the application of the appellant for leave to intervene in this action.

At the outset, the plaintiff makes the point that there is here no record upon which this court can determine whether the court below erred by making the order and entering the judgment appealed from, and we think this position must be sustained.

The transcript contains the pleadings of the original parties, a temporary injunction granted by the court against the defendant upon the filing of the complaint, and the notice of appeal. It also contains a bill of exceptions as proposed by the appellant and settled by the court on the proceeding involving the proposed intervention. The said bill embodies the following documents and none other: The proposed complaint in intervention, a proposed answer to the plaintiff's complaint, the written agreement upon which plaintiff's action is founded, and the order disallowing the application for leave to intervene. The transcript purports to be authenticated by the certificate of the clerk of the court, which reads, in part: "That the foregoing is a true transcript of the judgment-roll in the above-entitled cause, now on file in my office, together with other proceedings, papers and minutes of the said superior court herein contained."

While an order disallowing an intervention amounts in legal effect to a final judgment as to the proposed intervener (*Dollemayer v. Pryor*, 150 Cal. 1, [87 Pac. 616]), it seems

to be settled that, where an appeal is taken from such order, the record thereon must be authenticated by a bill of exceptions containing all the papers and documents used in that particular proceeding and upon which the trial court acted in making the order. This conclusion is in accord with rule XXIX of the supreme court, [160 Cal. lvi, 119 Pac. xiv], which provides: "In all cases of appeal from the orders of the superior court, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law." We know of no other mode provided by law for authenticating the record on a motion such as the one resulting in the order from which this appeal has been taken than by a bill of exceptions. It can hardly be said that there is, within the contemplation of section 670 of the Code of Civil Procedure, a judgment-roll in a proceeding on a motion for leave to intervene in an action, where the motion has been denied; hence, the certificate of the clerk of the trial court, certifying that "the foregoing is a true copy of the transcript of the judgment-roll in the above-entitled cause" is not an authentication of the record on the motion. There is, in strictness, no judgment-roll until the action has been tried and a decision therein reached on the merits. We cannot, therefore, conceive how it could be held that the certificate of the clerk to a record of the nature of the one before us can amount to anything, in so far as it purports to be evidence of the authenticity of such record. As stated, the only proper mode for authenticating a record on an appealable order is by a bill of exceptions, as required by rule XXIX of the supreme court. [160 Cal. lvi, 119 Pac. xiv].

It follows that all that we are authorized to review on this appeal are the papers and documents embraced in and authenticated by the bill of exceptions which is printed in the transcript. In other words, we cannot, in the consideration of this appeal, examine the pleadings of the original parties or any other documents contained in the transcript that are not embodied in the bill of exceptions. Thus confined in our consideration of the record before us, we cannot say that the court below erred in refusing to permit the appellant to intervene in this action.

The proposed complaint in intervention alleges that the defendant is a corporation, and that the appellant is a stockholder therein and as such "has a material interest in the subject matter in litigation in the above-entitled cause"; that the transaction giving rise to this action was the direct result of a fraudulent scheme jointly conceived and concocted by the plaintiff and certain members of the board of directors of the defendant for the purpose of turning over to the plaintiff, without an adequate or any consideration, the property of the defendant, in fraud of the rights of the appellant and other stockholders in the latter; that, to accomplish that end, an alleged written agreement was entered into between the plaintiff and the defendant, whereby all the property of the latter would be transferred to the plaintiff; that said agreement, not having been consented to by the stockholders of the corporation holding of record at least two-thirds of the issued capital stock of said corporation (Civ. Code, sec. 361a), is void and cannot, therefore, be enforced against said defendant. The proposed complaint in intervention further declares that the answer of the defendant to the plaintiff's complaint admits the validity of said agreement and fails to set up the facts disclosing the fraudulent character of the transaction upon which this action is founded and so fails to show that the plaintiff and the defendant and the latter's board of directors are parties to said fraudulent transaction; that the appellant has frequently requested the defendant and its attorneys of record in this action to amend the defendant's answer to the plaintiff's complaint by setting up therein the alleged fraud referred to, but that the defendant and its attorneys have failed and refused so to amend said answer.

The record does not reveal the reason or reasons which moved the court below in its course on the appellant's motion. But, whatever might have been the grounds upon which the said motion was denied, we must assume, in the absence of an affirmative showing to the contrary, that the action of the court in disposing of it was legally justified. In other words, every presumption in support of the order must be indulged, it not appearing from the face of the record that the court erred in making it, and we must presume, therefore, that the appellant, on his motion, submitted to the court no legal ground or reason for the intervention sought for by him.

In the absence from the bill of exceptions of the pleadings of the original parties, it is manifestly impossible for this court to determine whether the proposed intervention, as indicated by the pleadings therein tendered by the appellant, appertains to the same transaction or the alleged cause of action upon which this action is founded. Nor can it be told whether the appellant is interested in the subject matter of the litigation and entitled to intervene. (Code Civ. Proc., sec. 387.) And even if, by any stretch of the imagination, we were enabled to infer from the averments of the appellant's pleadings that his proposed intervention related and was pertinent to the cause of action declared upon in the plaintiff's complaint, and that he is an interested party within the purview of section 387, we are not informed by the record whether he, in his said complaint, has presented any different or further facts than those set up in the defendant's answer. In other words, for all that we can know from the record as it appears before us, the answer of the defendant may contain all the facts which are pleaded in the proposed pleadings of the appellant, including the charge therein made that the transaction upon which this action is founded originated in a fraudulent scheme hatched by the plaintiff and certain members of the board of directors of the defendant for the purpose of effecting a transfer of the property of the defendant to the plaintiff, in fraud of the rights of the other stockholders of the latter.

At all events, under the record as it is presented here, it is plain that there is no other course open to us but to uphold the order appealed from, and the same is, accordingly, affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 271. Third Appellate District.—July 28, 1914.]

THE PEOPLE, Appellant, v. GUS PETROS, Respondent.

CRIMINAL LAW—ORDER GRANTING NEW TRIAL—APPEAL—OPINION OF TRIAL COURT AS PART OF RECORD.—Upon an appeal from an order granting a new trial in a criminal prosecution the opinion of the trial court, rendered at the time of the granting of the motion, which sets forth the reasons impelling the conclusion of the court that the verdict was not justified or sustained by the evidence, is no part of the record and cannot be considered in determining the propriety of the order.

ID.—PANDERING—ATTEMPT TO COMMIT—CONFLICT IN EVIDENCE.—In this prosecution for pandering there appears a conflict in the evidence upon the vital question whether the defendant committed any overt act in furtherance of what seems to have been a well-established intention in him to commit the crime charged, and hence the appellate court is required to affirm the order of the trial court granting a new trial on the ground of the insufficiency of the evidence to sustain the verdict of conviction.

ID.—NEW TRIAL—CONFLICTING EVIDENCE—DISCRETION OF TRIAL COURT. The granting or denying of a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon an appellate court, unless it appears that there has been an abuse of discretion. The action of the trial court, in such a case, is so far a matter within its discretion that its decision, if there is any appreciable conflict in the evidence, is not open to review.

ID.—MOTION FOR NEW TRIAL—AUTHORITY OF TRIAL COURT—PROBATIVE VALUE OF TESTIMONY.—While a trial court will not be allowed to trespass upon the functions of the jury, it is nevertheless invested with a supervisory control over a trial before a jury and is legally authorized to grant a new trial where it entertains a well-founded opinion, or one which appears to be sufficiently well-founded to preclude a reviewing court from declaring it not to be, that the result reached by the jury is not justified by the evidence. And, in determining this question upon a motion for a new trial, the trial court may pass upon the probative value of the testimony submitted in proof of the charge against the accused.

ID.—PANDERING—ATTEMPT TO COMMIT—WHAT CONSTITUTES.—Where a man represents to a woman that he will procure her a position if she will accompany him to a certain city, and thereupon he takes her to a hotel in such city, where they occupy apartments as husband and wife, and in a few days he turns her over to a prostitute to be put in a house of prostitution, he is guilty of an attempt to

commit pandering, notwithstanding he does not personally procure for her a room or house in which to carry on prostitution, and the prostitute, to whom he intrusts her, intends to and does deliver her from him and places her in charge of the authorities for her protection.

ID.—WHEN ATTEMPT AT CRIME IS COMPLETED—INTERVENTION OF CIRCUMSTANCES PREVENTING CONSUMMATION OF OFFENSE.—Under the language of the statute defining pandering, where it is made to appear that the inducement, persuasion, or encouragement, practiced by the accused, has reached the point that its effect would be to cause the female to become an inmate of a house of prostitution but for the intervention of circumstances apart from and independent of his will, the crime of an attempt to commit pandering is accomplished.

ID.—ATTEMPT TO COMMIT CRIME—WHAT CONSTITUTES.—An attempt to commit a crime consists of an intent to commit it, and a direct ineffectual act done toward its commission. To constitute the crime of an attempt to commit a crime, the acts of the defendant must go so far that they will result in the accomplishment of the crime unless frustrated by extraneous circumstances.

APPEAL from an order of the Superior Court of San Joaquin County granting a new trial. J. A. Plummer, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Appellant.

Stephen N. Blewett, for Respondent.

HART, J.—The defendant was accused by information of the crime of pandering, as defined by an act of the legislature of 1911 (Stats. 1911, p. 9), and upon being tried on said information was convicted of the crime of an attempt to commit the crime therein charged. (Pen. Code, sec. 1159.)

In due time, the defendant moved for a new trial on the following grounds: "1. . . . 2. . . . 3. That the verdict is contrary to law; 4. That the verdict is contrary to the evidence." The court made an order granting said motion "upon the ground of the insufficiency of the evidence to sustain the verdict."

This appeal is prosecuted by the people from said order.

The statute upon which the information is founded reads as follows:

"Section 1. Any person who shall procure a female inmate for a house of prostitution, or who, by promises, threats, violence, or by any device or scheme, shall cause, induce, persuade or encourage a female person to become an inmate of a house of prostitution, or shall procure for a female person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state, or any person who shall, by promises, threats, violence or by any device or scheme, cause, induce, persuade or encourage an inmate of a house of prostitution or any other place in which prostitution is encouraged or allowed to remain therein as such inmate, or any person who shall, by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procure any female person to become an inmate of a house of ill fame, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution, or who shall receive or give, or agree to receive or give, any money or thing of value for procuring, or attempting to procure, any female person to become an inmate of a house of ill fame within this state, or to come into this state or leave this state for the purpose of prostitution, shall be guilty of a felony, to wit: pandering, and upon conviction for an offense under this act shall be punished by imprisonment in the state prison for a period of not less than one year nor more than ten years."

In its charge to the jury, the court declared that "a verdict of guilty of pandering would be unwarranted" under the evidence, but instructed that it was within the legal province of the jury, under the evidence, to find the accused guilty of the crime of an attempt to commit the crime of pandering, if they were convinced by the evidence beyond a reasonable doubt that such an attempt had been made.

Embodied in the brief of counsel for the respondent is the opinion of the trial court, rendered at the time of the granting of the motion, and which sets forth at considerable length the reasons impelling the conclusion of said court that the verdict was not justified or sustained by the evidence. From said opinion it appears that the court is of the view that, although not questioning its verity, the evidence was insufficient, as a matter of law, to uphold a verdict of guilty of the crime of an attempt to commit the crime of pandering, and it

further appears therefrom that it was solely upon that view of the evidence that the new trial was granted. Doubtless influenced to a great extent by a consideration of said opinion and the views therein expressed, the attorney-general devotes his brief entirely to a discussion of the question whether, as a matter of law, an attempt to commit the crime of pandering is shown by the evidence, and, concluding that the trial court has thus betrayed a misapprehension of the scope and effect of the evidence adduced before the jury, insists upon a reversal of the order.

But, obviously, the opinion of the trial court setting out the reasons leading it to make the order from which this appeal is taken is no part of the record and cannot, therefore, be considered in reviewing this record. We must be governed entirely by the order itself and not by the reasons of the trial court for making it. It will be noted that the order is general in its terms, in so far as is concerned the specific ground upon which it is based, and does not specify any particular reason leading to the making of it.

The rule is thoroughly settled that "the granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of discretion." (*Domico v. Casassa*, 101 Cal. 413, [35 Pac. 1024]; *Warner v. Thomas etc. Works*, 105 Cal. 411, [38 Pac. 960]; *Edinger v. Sigwart*, 13 Cal. App. 667, 676, [110 Pac. 521, 524], and cases therein cited.) "Indeed, it has repeatedly been said in the cases that the action of a trial court in granting a new trial upon the ground of the insufficiency of the evidence to justify the decision 'is so far a matter within its discretion that, if there is any appreciable conflict in the evidence it is not open to review.' " (*Newman v. Overland Pac. Ry. Co.*, 132 Cal. 74, [64 Pac. 110]; *Otten v. Spreckels*, 24 Cal. App. 251, [141 Pac. 224].)

In this case there appears to be a conflict in the evidence upon the vital question here whether the defendant committed any overt act in furtherance of what seems to have been a well-established intention in him to commit the crime charged.

While a trial court will not be allowed to trespass upon the functions of the jury, it is nevertheless true that it is invested

with a supervisory control over a trial before a jury and is legally authorized to grant a new trial where it entertains a well-founded opinion, or one which appears to be sufficiently well-founded to preclude a reviewing court from declaring it not to be, that the result reached by the jury is not justified by the evidence. And, in determining this question upon a motion for a new trial, the trial court may, of course, pass upon the probative value of the testimony submitted in proof of the charge against the accused. In other words, such court may consider, examine, and scrutinize the testimony by the aid of those tests by which the jury are required to measure the worth and weight of the proofs adduced in substantiation of the charge, and if it thus reaches the conclusion that the jury, to reach its conclusion, must have accorded to such testimony undue weight and credit—that is to say, if it be persuaded by a just and fair consideration of the testimony that it is insufficient to establish guilt beyond a reasonable doubt, and that the jury formed an erroneous judgment on the probative power of the evidence—and, accordingly, in the exercise of the discretion committed to it as to such matters, grants a new trial, the order granting the motion must then be held to stand free from disturbance by a court of review.

For aught that may be ascertained from an examination of the record, now under review, the trial court might have concluded that, although the testimony presented by the people on its face appeared to disclose the guilt of the accused and, if believable, was sufficient to support the verdict returned, the witnesses giving such testimony had so given it as to convince it that they were not telling the truth, and that the jury, in according to the witnesses and their testimony the credit and the weight essential to the support of the conclusion that the defendant was guilty of the crime of which he was convicted, were influenced either by a misconception of the true worth or real evidentiary value of such testimony or by passion or prejudice, superinduced, perhaps, by the sentiment generally prevailing throughout the country against such acts as constitute the foundation of the charge preferred against the defendant. But, whatever might have been the specific reasons persuading the trial court to grant the motion on the ground that the evidence does not justify the verdict, this court is in no position to declare that the action of the court in that

regard involved an abuse of the discretion confided to trial courts in disposing of motions for new trials.

As before stated, however, the opinion of the learned trial judge appears in the brief of counsel for the defendant as a part of the argument advanced by the latter in support of the order appealed from, and, since it thus appears that it is his opinion that the facts brought to light by the evidence, assuming said evidence is credible and believable, do not bring the acts of the defendant as thereby disclosed within the condemnation of the statute under which he was prosecuted, and, in view of a probable retrial of the case, it is thought to be proper to give herein our conception of the legal effect of said evidence—that is, whether it can fairly and reasonably be said to show an attempt to commit the crime charged.

The facts are: The prosecuting witness, Bessie Edwards, first met the defendant early in the month of February, 1914, in the city of San Francisco. She was at that time just approaching her nineteenth birthday, and was employed as a domestic in the city of Oakland. The defendant proposed to her that she accompany him to the city of Stockton, where, he said, he would be able to secure a position for her as a waitress in a restaurant, at which nothing but "soft drinks and black coffee" were served with the meals. The prosecutrix assented to the proposition and, on the second day of February, 1914, went to the city of Stockton in company with the defendant. The defendant took her to a room in a rooming house situated near one of the railroad depots in said city, and there they remained together, occupying the same bed that night. The following day he secured a room in the Dale Hotel, where he registered himself and the young woman as husband and wife. They occupied the room together up to the time of the defendant's arrest, or for a period of five or six days. On two different occasions during this period of time the defendant brought men to the room, introduced them to the prosecutrix and gave her to understand that the purpose of their visits was to have sexual relations with her and for which each would pay her one dollar and fifty cents. Such relations she had with the men referred to and the money so obtained by her she turned over to the defendant in obedience to his demand for it. Prior to having these relations with other men, the defendant, so the prosecutrix said, would arise from bed at a very early hour in the

morning, would leave the room and seldom return until late in the day, leaving her alone and without food or means to procure a substantial meal. He would, on his return in the evening, bring her a sandwich. During that time she went out on the streets on but two occasions—on one for the purpose of procuring a few doughnuts at a nearby bakery, and on the other to purchase a cheap waist at a store situated within a few blocks of the Dale. It further was made to appear that, while the couple were rooming at the Dale, he told her of the "Bull Pen," a place in the city of Stockton to which those houses of prostitution which are each occupied by a single prostitute are confined, and said to her that he would have to "break her in," the inference from that statement being that he intended or desired to initiate her into the business of a prostitute.

On the Saturday evening of the week during which the couple occupied the room in said hotel, the defendant and prosecutrix went to the "Union Restaurant" for dinner. There they met a prostitute, known as Teddie Smith, and a male friend of the latter. The defendant introduced the prosecutrix to the Smith woman and her friend, and all four ate their meals at the same table. The defendant gave the prosecutrix some beer, but she drank very little of it, saying that she did not like it. When, however, she would drink a small amount of it, the defendant would immediately fill her glass with more beer. Finishing their meals, the Smith woman remarked that it was time for her to return to her "crib" (a term used to designate a place of prostitution of one or two rooms, and occupied by but one female), whereupon the defendant asked her to take the prosecutrix with her, saying, "I wish you would get her to work tonight, because I have the last dollar in my pocket." Miss Smith then inquired whether the girl had ever "worked" in a "crib," and the defendant immediately replied that she had "worked" in a "parlor house." "I thought she looked green," continued Miss Smith, and I says, 'how old are you?' and he (defendant) said '23.' The Smith woman then said that she would take the prosecutrix with her to the "crib" and thereupon the two women left the restaurant together and the two men departed in another direction. Miss Smith continued: "Well, I knew she couldn't get work Saturday night, and I knew that she wasn't in the hands she ought to

be; I wanted to get her alone to find out whether she was a sporting girl. So we got outside and I asked her and she owned up to it—she owned up to me; she said she was afraid though she would have to go, or he would kill her; I told her no, he would not; she said she would have to go or he would kill her; I told her no; I says, 'no, girlie, it is an awful life to live'; she said, 'Well, I don't want to do that,' but she says, 'I will have to do it or he would kill me,' I says, 'no, he won't; I will take you and put you in hands you won't get hurt.' " Miss Smith took the prosecutrix to her apartments or "crib," which was one of a number of "cribs" or houses of prostitution constituting the "Bull Pen" before referred to. She telephoned from there to police headquarters and reported the case to the officers, and a policeman was at once dispatched to the "crib" and took charge of the girl.

The above statement of the facts embraces, in substance, the stories as told before the jury by the prosecutrix and Miss Smith.

The theory of the learned trial judge, as indicated by the opinion rendered by him when granting the motion for a new trial in this case, is that the facts as given above disclose nothing more than mere preparation to commit the crime of pandering—that is to say, that, while the evidence shows that the defendant had the intent to commit said crime and was engaged in making preparation to carry out that intent or to consummate the offense, it does not show that he made an attempt to do so; that, to complete the offense of an attempt to commit the crime of pandering, the accused must have attempted to secure a room or a house to be used by the female for the purposes of prostitution.

In support of its conclusion, as above stated, the court cites and relies upon the following cases: *People v. Matsicura*, 19 Cal. App. 75, [124 Pac. 882]; *People v. Murray*, 14 Cal. 159; *Ex parte Floyd*, 7 Cal. App. 588, [95 Pac. 175]; *Ex parte Turner*, 3 Okl. Crim. 168, [104 Pac. 1071].

We are unable to persuade ourselves that those cases support the conclusion reached by the learned trial judge in the case at bar. In other words, we are of the opinion that the evidence in this case, assuming only for the purposes of this discussion, that it was not for any reason unworthy of credence or belief, goes much further than any of the cases re-

ferred to and shows a clear attempt by the defendant to commit the crime with which he was charged.

"An attempt to commit a crime is compounded of two elements: 1. The intent to commit it, and 2. A direct ineffectual act done towards its commission." (2 Bishop on Criminal Procedure, par 71.) Or, as Wharton, page 268 of the eleventh edition of his work on Criminal Law, defines it: "An attempt is an intended apparent unfinished crime." Of course, as that learned author proceeds to say, "there must be some appreciable fragment of the crime committed," and if it be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, then the attempt is complete. In other words, "to constitute the crime of an attempt to commit a crime, the acts of the defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances." (*People v. Grubb*, 24 Cal. App. 604, [141 Pac. 1051]; 1 Wharton on Criminal Law, 10th ed., sec. 181; Clark & Marshall's Law of Crime, 2d ed., sec. 123.)

That the evidence in this case clearly shows that the defendant's intention was to place the prosecutrix in a house of prostitution for the purpose of carrying on that business, is not denied. Manifestly, as the cases cited by the trial court in its opinion and above mentioned, say, the mere intention to commit a crime does not of itself constitute an attempt to commit it; nor does the mere preparation to commit the crime, unaccompanied by any overt act, constitute an attempt to commit it. And if the evidence in this case disclosed nothing more than an intention and preparation to commit the crime of pandering, we would be compelled to hold with the trial court that the crime of an attempt to commit said offense was not established. But we think that the evidence clearly shows that the defendant went much further than merely to form the intent to commit the crime charged and to take certain preliminary steps, amounting only to preparation, looking to the execution of such intent.

In the first place, it is to be remarked that the statute, among other things, provides that any person who, by any device or scheme, shall cause, induce, persuade or encourage a female person to become an inmate of a house of prostitution, is guilty of a felony. It is further to be observed that an examination of the information will disclose that it is in

the language of the statute, and that, among other things, it charges the defendant with having induced, persuaded, and encouraged the prosecutrix to become an inmate of a house of prostitution. It cannot be doubted that, under the language of the statute, where it is made to appear that such inducement, persuasion, or encouragement had reached the point that its effect would have been to cause the female to become an inmate of a house of prostitution but for the intervention of circumstances apart from and independent of the will of the persuader, the crime of an attempt to commit the crime denounced by the statute had been fully accomplished. It seems clear to us that the acts of the defendant had, according to the face value of the evidence, reached that very point. He, indeed, seems to have done all that he could do to induce her to become an inmate of such a house. While it is true that he did not personally procure for her a house or a room to be used by her for the purpose of plying the business of a prostitute (an act which we do not conceive to be indispensably essential to the consummation of the offense in all cases), he nevertheless, evidently having her under his domination and control, turned her over to the custody of a keeper of a house of prostitution, with instructions to put her to "work" at once, saying in effect that his supply of money was about exhausted, and the woman into whose charge she was thus placed, acting upon his persuasions, took her to a house of prostitution. If he had himself taken her to such a house for the purpose of making her an inmate thereof, no one would be found to say that such act would not constitute an attempt to commit the crime of pandering as defined by the statute upon which the information is based. And we are unable to perceive any difference in principle between such an act and the act of the accused in turning the prosecutrix over to the custody of a keeper of a house of prostitution with instructions that the latter place her in such a house to become an inmate thereof for the purpose of carrying on the business of prostitution. What the motive of the woman, Smith, might have been in taking the girl to her house of ill-fame—whether to make her an inmate thereof in compliance with the expressed wish and request of the defendant, or only to secure an opportunity for placing her in the charge of the authorities and thus protecting her against the iniquitous designs of the accused—is immaterial, so far as the de-

fendant himself is concerned. That circumstance did not and could not have the effect of rendering his conduct any the less an attempt to commit the crime of pandering. Indeed, but for the part that was finally played in the matter by Teddie Smith, the prosecutrix would undoubtedly there and then have entered upon the career of a common prostitute as the direct result of the acts of the defendant. That she did not, was due entirely to the will and act of the Smith woman and not to any act or wish of the accused. And it was this most commendable and humane intervention in the malodorous transaction by the fallen woman, Teddie Smith, that constituted the "extraneous circumstances"—circumstances arising independently of the will of the accused—which frustrated or prevented the execution of his purpose to place her in a house of prostitution as an inmate thereof.

As stated, the facts developed in the cases in which the learned trial judge perceives support for the conclusion declared in his opinion are very much different from those of the present case.

In the case of the *People v. Matsicura*, 19 Cal. App. 75, [124 Pac. 882], the defendant was convicted of the crime of pandering under the statute in question. The undisputed evidence showed that the defendant was the owner or lessee of a house of prostitution, in Bakersfield, Kern County, and that the prosecutrix, some months prior to the date of the alleged commission of the crime of which the defendant was convicted, occupied a room in said house and there carried on the business of prostitution; that she had left said house and gone to Stockton, where she engaged in said business for a short period, when she sent word by wire to the defendant to either go to Stockton and take her back to Bakersfield or send her a railroad ticket to the latter place. The defendant forwarded a ticket to her, and she arrived at Bakersfield early on the following morning. She immediately repaired to the house of the defendant, who was then still in bed, and awakened him and accompanied him to a restaurant, where they had their breakfast. During the course of the meal she asked the defendant whether her "crib" was ready for her, and he replied, "No, not yet, but after breakfast I will fix it up for you." The defendant was arrested while at breakfast and charged with the crime of pandering, of which he was convicted upon evidence disclosing no other facts than

those above detailed. It will at once be noted that the court in that case was dealing with a verdict of conviction of the crime of pandering itself and not of an attempt to commit that crime. Obviously, the uncontradicted facts utterly failed to establish said crime, but it is not declared in the opinion that a conviction of an attempt to commit it might not have been thereby sustained.

In respect of the facts, we perceive no parallel between the other cases cited by the learned trial judge in his opinion and the case at bar. The evidence in those cases revealed no overt acts by the accused directed toward the commission of the specific crimes charged, but merely disclosed preparation of the means whereby said crimes might have been committed.

We are satisfied that the evidence, as disclosed by the record, if not for any reason unbelievable, is sufficient to establish an attempt on the part of the defendant to commit the crime of pandering as the same is described by the statute upon which the information is founded.

However, for the reasons stated in the outset of this opinion, the order appealed from must be affirmed, and it is so ordered.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1471. Second Appellate District.—July 29, 1914.]

T. G. WATTERSON et al., Respondents, v. THE OWENS RIVER CANAL COMPANY (a Corporation), Appellant.

CONSTRUCTION CONTRACT—FAILURE TO RECORD—EFFECT ON LIABILITY OF SURETY OF CONTRACTOR.—The fact that a construction contract is invalid as between the parties because not recorded as required by section 1183 of the Code of Civil Procedure, does not release the surety on the bond of the contractor from liability.

ID.—CHANGE IN CONTRACT—WHETHER DISCHARGES SURETY.—A change made in such contract, without the consent of the surety, releases him; but this rule would not apply to a change effected by corporate officers without authority, nor to a change orally agreed upon but not actually executed.

ID.—ABANDONMENT OF WORK BY CONTRACTOR—COMPLETION OF BUILDING BY SURETY—ESTOPPEL TO OBJECT TO CHANGES.—If the contractor abandons work under such construction contract, and his surety, without objection, completes the contract in accordance with changes therein made and demands and receives payment therefor, the surety cannot successfully maintain that the changes were outside the terms of the written contract, or that they were made without his consent.

ID.—RIGHTS OF SURETY ON COMPLETION OF CONTRACT—COMPENSATION AND LIEN.—In completing the work under the unrecorded contract the surety stands in the place of his principal, the contractor, and hence is not entitled to a lien, under section 1183 of the Code of Civil Procedure, for the value of anything furnished or done, but he is limited in his recovery, as in like circumstances the contractor would be, by the contract price named in the written agreement, after adjustment of all additions and deductions due to changes in the work as it progressed, and also after allowance of the proper credits for payments made by the owner.

ID.—SUBCONTRACTORS—RIGHT TO LIEN WHERE PRINCIPAL CONTRACT NOT RECORDED.—Although the contractor or his surety are not entitled to a lien under such unrecorded contract, subcontractors are entitled to liens for labor performed and materials furnished.

ID.—SURETY—LIABILITY ON ASSUMING PERFORMANCE OF PRINCIPAL'S CONTRACT.—When a surety, in pursuance of the terms of an undertaking, assumes the performance of the principal's contract, he must, by being subrogated to the rights of the principal thereunder, necessarily become subject to all of his liabilities.

APPEAL from a judgment of the Superior Court of Inyo County and from an order refusing a new trial. Wm. D. Dehy, Judge.

The facts are stated in the opinion of the court.

L. C. Hall, Potter & Potter, and Wm. J. Clark, for Appellant.

P. W. Forbes, S. E. Vermilyea, and Ben H. Yandell, for Respondents.

CONREY, P. J.—In the superior court, the action of the plaintiff Watterson and a separate action of the other plaintiffs, against the same defendant, were consolidated. From a judgment in favor of the plaintiff Watterson and in favor of certain other plaintiffs, and from an order denying defendant's motion for a new trial, the defendant appeals.

On December 30, 1908, P. N. Snyder and C. A. Collins entered into a written contract with the Hillside Water Company and the Owens River Canal Company, whereby the contractors agreed to perform the excavation work required by certain specifications, for the purpose of making improvements in a canal belonging to defendant Owens River Canal Company. The contract was dated November 30, 1908, and was delivered on December 30th following. Work was commenced early in December, and the contract was not recorded until February 9, 1909. At the time of the execution of the written contract, the plaintiff T. G. Watterson executed to defendant Owens River Canal Company an undertaking in the penal sum of five thousand dollars, conditioned upon due performance of the contract by the contractors. As Collins does not appear any further in the transactions, we will discuss the case as if Snyder were sole contractor.

The consideration to be paid for this work as stated in the contract was nineteen thousand dollars, installments payable monthly on estimates to be made by the engineer. As the contract was not recorded before commencement of the work, the transaction became subject to the provision of section 1183 of the Code of Civil Procedure, that such contracts "shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

The specifications, which are referred to in the contract and attached thereto, contain the following provisions:

"The work to be done consists of excavating one or both banks of the canal to double its present cross section with a view of doubling the present carrying capacity of the canal.

"The company's engineers will give levels and grade stakes designating the excavations that are to be made, and the contractor is to pay particular attention to these stakes and make the excavation true to the stakes given.

"At the discretion of the engineer in charge the excavations may be made on either the upper or lower bank, or both banks of the canal, as the character of ground and material indicates for the most economical and safest excavation.

"It is also understood and agreed that the said engineer in charge may require changes to be made in the route and line of the canal, particularly where the distance can be shortened, and the engineer in charge may direct such changes; and in settling for the same, allowance shall be made to either party, whether the quantity or quality of the materials removed shall be greater or less or of a different character from the estimates and classifications above referred to and made a part of this contract."

The contractor Snyder took charge of the work and conducted the same personally and by sub-contractors for various sections until February 16, 1909. Disputes arose between him and the engineer, on account of changes in levels as furnished by the engineer, and on account of a change made by directing a certain cut-off which shortened the canal. On January 8th a conference took place between the contractor and the engineer and some officers of the two corporations named in the contract, as to the manner in which the work should be done, and it was understood that Snyder would follow the directions given as to these changes ordered by the engineer. But dissatisfaction continued on both sides, so that Snyder gave up the work on February 16th, and at the same time the plaintiff Watterson took charge of the work in place of Snyder. Watterson continued the work until April 16th, when it was completed.

Watterson claims that the verbal understanding at which the contractor and the said representatives of the owner arrived on January 8th, constituted a change in the contract, such as to relieve Watterson from the obligations of his bond, and that as the contract itself was void, his work from February 16th to April 16th was on an original request of the owner, entitling him to claim his lien under the provisions of section 1183 of the Code of Civil Procedure, quoted above.

The appellant contends that the changes made in the work were only such as were provided for in the specifications; and that the work done by Watterson was done by him by virtue of his relation to the transaction as bondsman, for the contractor, and for the purpose of protecting himself from liability on the bond.

There was no formal contract, either written or unwritten, between plaintiff Watterson and the owner, by virtue of which Watterson undertook to complete the work. Mr. L. C.

Hall was treasurer, and was a director and also attorney for the Owens River Canal Company. Mr. Watterson's testimony is that on February 9th or 10th Mr. Hall complained to him that Mr. Snyder was not complying with the instructions of the engineer and was not doing the work satisfactorily, and that they had lost confidence in him, and asked Watterson to go ahead and finish the work. On February 15th, Watterson told Snyder about this. Snyder said, "All right, go ahead and finish it." Watterson replied, "All right." It was under these circumstances that Watterson took charge of this work and did all that was done by him in completion thereof.

The payments by the defendant amount to sixteen thousand dollars, of which the sum of ten thousand dollars was paid prior to February 16th. All of the payments were delivered to Watterson, who was a creditor of Snyder for supplies furnished, and Watterson's receipts recite that the moneys so received were on account of the Snyder and Collins contract and were to be used for payment of such accounts as would constitute liens against the canal.

The demand of Watterson in this action is for the sum of \$20,189.54, and the decree appealed from is in his favor for the sum of \$10,285.71, with interest, and in favor of the other plaintiffs for sums which in the aggregate are a little over one thousand dollars.

The findings of the court state that on the sixteenth day of February, 1909, the plaintiff Watterson "at the personal instance and request of said defendant, and by and with the consent and authority of said contractor, P. N. Snyder," took charge of the described work, and completed the same on April 16, 1909.

The court's findings declare that on January 8, 1909, "officers and agents" of the defendant, and P. N. Snyder, "made an oral agreement" whereby the work in question was materially and substantially altered from the manner and conditions specified in the contract of November 30, 1908, and the specifications thereof; that by virtue of said oral agreement the work was made more difficult and expensive than that provided for in said written agreement; that the work performed, from January 8, 1909, until the completion thereof on April 16, 1909, was essentially different from and constituted a material departure from said original terms

and conditions; that plaintiff Watterson was not consulted with reference to said oral agreement and said changes and did not assent at any time to said changes in said work, or to any change or departure from the terms and conditions of the original contract.

Finding IV is as follows: "That on the 16th day of February, 1909, a large portion of the said construction, alteration, enlargement, addition to and repair of said Owens River Canal had been done, performed and made by said P. N. Snyder, one of said contractors, under said contract of November 30th, 1909." There is no finding that shows how much of the changes in the contemplated work was executed by Snyder, and how much by Watterson, but the finding generally is that these changes were involved in the work done from January 9th to April 16th. Watterson at all times had knowledge of the original contract and specifications. He did not, when he took charge of the work, or at any time, make any protest against doing the work as directed, including these changes. He did not inform the defendant that he was taking up this work independently of the contract, or that he was not assuming the work as a bondsman for a contractor unable or unwilling to perform the obligations of his contract.

Although the contract is void under the code provisions to which we have referred, yet the matter of changes in the work is material to the questions before us, because the invalidity of the contract did not destroy the liability of Watterson as surety on the bond. (*Kiessig v. Allspaugh*, 91 Cal. 234, [27 Pac. 662]; *Summerton v. Hanson*, 117 Cal. 252, [49 Pac. 135].) And if the work provided for by the original contract was changed by the parties thereto without consent of Watterson, he would thereby be released from his liability on the bond. (*Alcatraz Masonic Hall Assoc. v. United States Fidelity and Guaranty Co.*, 3 Cal. App. 338, [85 Pac. 156]; *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 497, [99 Pac. 856].)

The conclusion of the court below, that the written contract was thus changed by an oral agreement, cannot be sustained. "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." (Civ. Code, sec. 1698.) Though it be conceded for the moment, that the changes in the work, which have been

mentioned, were not such changes as the engineer might order as provided in the written contract, the objection remains in force, that there was not any evidence that the "officers and agents," who are found to have made the oral agreement, were authorized by defendant to make for it a new or amended contract. And even if they had been so authorized, the conversation of January 8th would not be effective to create changes in the contract until the proposed changes in the work were actually executed. Until thus executed, and in force as contract changes made without the consent of the surety, they could not be sufficient to release him from liability on his bond.

But it further appears that when the changes in the work were actually made in course of the performance thereof, very large portions of those changes were executed by Watterson himself. This being so, he was necessarily consenting thereto, unless his relations to the transaction, as surety on the bond, had been previously abrogated by reason of the small proportion of changes in the work, which had been executed by Snyder. The evidence all shows, that after Watterson had taken charge of the work, and with full knowledge of the facts as they then were, he continued to receive payments as we have before stated, accepting them as payments on the Snyder and Collins contract, and assuring defendant that the money might safely be paid, as defendant had his bond for completion of the contract. He obtained these payments, not merely as compensation earned by Snyder for work done prior to February 16th, but as payments on the contract generally, and represented that he must have them in order that he, Watterson, might be able to complete the work. In view of these facts it seems clear to us that the plaintiff Watterson cannot successfully maintain that the changes now under consideration were outside the terms of the written contract, or that they were made without his consent.

It is therefore clear also that when Snyder told Watterson to go ahead and finish the work of this contract, and Watterson consented and proceeded in accordance with that request, he was in the situation of a surety on a contractor's bond, who undertakes to finish the contract work for his principal. "When a surety, either corporate or individual, in pursuance of the terms of an undertaking, assumes the performance of

the principal's contract, such surety, by being subrogated to the rights of the principal thereunder, must necessarily become subject to all of his liabilities." (*Ausplund v. Aetna Indem. Co.*, 47 Or. 10, [81 Pac. 577]; *Hughes v. Gibson*, 15 Colo. App. 318, [62 Pac. 1037].)

Since Watterson in completing the work stood in the place of the contractor, he was not, any more than Snyder could be, a person deemed to be acting "at the personal instance of the owner," as described in the Code of Civil Procedure, section 1183, or entitled to any lien for the value of anything furnished or done by him. His right of recovery, if any, for the value of the labor and materials furnished by him, was merely the right to recover a personal judgment therefor, under like limitations as were binding upon Snyder. As Mr. Watterson succeeded and in that way represented the contractor, it follows that Watterson would be limited in his recovery (as in like circumstances the contractor would have been) by the contract price named in the written contract, after adjustment of all additions and deductions due to changes in the work as it progressed, and also after allowance of the proper credits for payments made by the owner. (*Laidlaw v. Marye*, 133 Cal. 170, 176, [65 Pac. 391]; *Condon v. Donohue*, 160 Cal. 749, 754, [118 Pac. 113].) In the trial of this action, however, this plaintiff not only attempted to assert a lien, but has obtained a decree affirming his claim without regard to the limitations above noted.

With respect to the cause of action stated in plaintiff's complaint, his right to recover herein, and to enforce the lien claimed by him, depends primarily upon the allegation and finding that on or about the sixteenth day of February, 1900, plaintiff and defendant entered into an agreement, under which plaintiff was to furnish certain labor and materials, for the purposes named. There is no evidence of any such agreement, unless the fact could be derived from the circumstances to which we have referred. As these circumstances do not support the claim as to the alleged contract, the appeals must be sustained as to him.

Concerning the judgment in favor of plaintiffs Charles Powers and Arthur Powers, appellant urges nothing in favor of its appeal, except the bare proposition that there is a material variance between the claim of lien and the evidence as to the person by whom they were employed. A comparison

of the references in appellant's brief, with the record in the transcript, fails to support the claim of appellant as to this matter. The plaintiffs Powers were sub-contractors under the contractor Snyder. Being persons who furnished labor and materials to a so-called contractor whose contract was void as herein shown, these plaintiffs were entitled to their lien for the value of the labor furnished by them.

The judgment and decree in favor of the plaintiff T. G. Watterson, and the order denying defendant's motion for new trial as to plaintiff Watterson, are reversed. The judgment and decree and the motion for new trial, as between the defendant and the plaintiffs Charles Powers and Arthur Powers, are affirmed. The appeals against the decree in favor of the other respondents have been abandoned, and are dismissed.

James, J., concurred.

Shaw, J., concurred in the judgment.

A petition for a rehearing of this cause was denied by the district court of appeal on August 28, 1914, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 26, 1914.

[Civ. No. 1258. Third Appellate District.—July 29, 1914.]

CATHERINE ALTPETER et al., Respondents, v. POSTAL TELEGRAPH-CABLE COMPANY (a Corporation), Appellant.

APPEAL—APPEALABLE ORDER OR JUDGMENT—WHETHER APPEAL LIES FROM ORDER REFUSING TO VACATE.—Generally the party aggrieved by a judgment or an order must take his appeal from the judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside.

Id.—RELIEF IN EQUITY FROM JUDGMENT AFTER EXPIRATION OF TIME TO APPEAL.—The aggrieved party to a judgment ordinarily must appeal to equity in the form of an independent suit for that purpose, where, the time within which he might have appealed therefrom having

passed, he desires to set it aside for reasons extrinsic or collateral to the questions examined and determined in the action.

Id.—EXCEPTIONS TO RULES—SECTION 473 OF THE CODE OF CIVIL PROCEDURE.—But there are exceptions to these rules, and the legislature has seen fit to make provision for the application of some of these exceptions in section 473 of the Code of Civil Procedure.

Id.—FAILURE TO SERVE SUMMONS—RIGHT OF DEFENDANT TO VACATE JUDGMENT AND FILE ANSWER.—The provision of such section permitting the defendant to answer where personal service of summons has not been had, necessarily presupposes the right in the party to the action upon whom personal service of summons has not been had to have the judgment set aside preliminarily to the filing of the answer.

Id.—SERVICE OF SUMMONS ON WRONG CORPORATION—RIGHT OF CORPORATION NOT SERVED TO HAVE JUDGMENT VACATED ON MOTION.—Under the provision of section 473 of the Code of Civil Procedure that “when from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action,” a defendant corporation which was not served with summons, service having been made instead upon a foreign corporation by the same name, and hence which did not defend or appear, may, six months after it might have appealed from the judgment, move to set it aside.

Id.—SECTION 473 OF THE CODE OF CIVIL PROCEDURE—CUMULATIVE REMEDY.—Such provision of the Code of Civil Procedure does not contemplate a new or an independent suit in equity to set aside the judgment in order to enable the defendant to answer to the merits; it is intended as a distinct remedy from and cumulative to that which may be had in a court of equity to annul a judgment, the time for appealing from which has passed.

Id.—CONSTRUCTIVE SERVICE—WHETHER CODE PROVISION CONFINED TO CASES OF.—The application of such code provision is not confined to cases where constructive service has been had and a default judgment thereupon entered.

APPEAL from an order of the Superior Court of Yolo County refusing to vacate a judgment. N. A. Hawkins, Judge.

The facts are stated in the opinion of the court.

J. S. Spilman, and L. T. Hatfield, for Appellant.

E. E. Gaddis, for Respondents.

THE COURT.—This is a motion to dismiss the appeal taken by the defendant from an order refusing to grant a motion to vacate the judgment.

The action was by the plaintiffs for damages for the alleged destruction by the defendant of four walnut trees standing and growing immediately in front of the former's premises on Court Street, in the city of Woodland. The jury, by whom the cause was tried, returned a verdict in favor of the plaintiffs in the sum of five hundred dollars, and the court, acting upon the authority of section 3346 of the Civil Code and section 733 of the Code of Civil Procedure, entered judgment for the plaintiffs on said verdict for treble the amount assessed by the jury.

It is important in this proceeding, as will presently be perceived, to know that said judgment was entered on the eleventh day of November, 1912, and that it contains, among others, the following recitals: "This action came on regularly for trial on the 24th day of September, A. D. 1912. The parties appeared by their attorneys, E. E. Gaddis, Esq., counsel for plaintiffs, and L. T. Hatfield, Esq., for defendant. A jury of twelve persons was regularly impaneled, and sworn to try said action. Witnesses on the part of plaintiffs and defendant were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court with the verdict signed by the foreman, and, being called, answered to their names and say," following which is the verdict.

But a clearer understanding of the legal propositions advanced in support of and against the allowance of the present motion may be obtained by a summary statement of the history of this action and its several ramifications.

Two different and distinct proceedings growing out of this case—one an application for a writ of review and the other an appeal from the judgment by a New York corporation of the same name as that of the defendant here—have heretofore been before and decided by this court. (See *Postal Telegraph-Cable Co. v. Superior Court*, 22 Cal. App. 770, [136 Pac. 538], and *Altpeter v. Postal Telegraph-Cable Co.*, 22 Cal. App. 63, [133 Pac. 329].) The opinions in those cases contain a recital of the circumstances under which the case came to this court on the occasions referred to. As the

facts constituting a history of the case as they are disclosed by the present record are substantially given in the case of *Altpeter v. Postal Telegraph-Cable Co.*, 22 Cal. App. 63, [133 Pac. 329], we will, as a matter of convenience, follow said opinion in some measure in stating said facts here.

"It appears that there are two separate and distinct corporations named and known as 'Postal Telegraph-Cable Company,' one of which was organized and is existing under and by virtue of the laws of the state of New York and the other organized and existing under and by virtue of the laws of the state of California. It further appears that the corporation originally sued by the plaintiffs was the New York corporation, the complaint alleging that the defendant, Postal Telegraph-Cable Company, was a corporation organized, existing, and doing business under and by virtue of the laws of the state of New York. When the trial of the case was proceeded with, it was, in the outset thereof, discovered that, if the plaintiffs suffered the damage as set out in the complaint, such damage was caused by the California corporation named and known as Postal Telegraph-Cable Company and not by the New York corporation of that name, whereupon counsel for the plaintiffs applied to the court for leave to amend the complaint so as to substitute the California corporation for the New York corporation as party defendant. After an extended discussion between counsel, in the course of which the attorney for the appellant declared that the two corporations were distinct entities, and that he was in court for the sole purpose of representing the New York corporation and that the California corporation was without a legal adviser or representative in the action, the court allowed the amendment. Although interposing an objection to the allowance of the amendment on the ground that the court was without jurisdiction to do so, and, although reserving an exception to the order of the court permitting the amendment, counsel for the appellant, after the order granting the plaintiffs leave to amend was made and entered, retired from further participation in the trial of the action, declaring that, 'if the California corporation is the defendant in this case, we have no appearance for it and no authority to appear.' The trial of the cause was thereupon proceeded with in the absence of a legal representative of the defendant, with the result as hitherto stated."

The defendant (that is, the California corporation), shortly after the trial of the action, petitioned this court for a writ of *certiorari* for the purpose of annulling and setting aside all the proceedings had in the action, because, as was the claim, they were *coram non judice* and void. The specific ground upon which the application for said writ was based was that the substituted defendant had never been served with summons, that it, consequently, had no notice of the institution and pendency of the action, and that, therefore, the court had not acquired jurisdiction of the person of said defendant. On March 13, 1913, this court handed down its decision on said application, denying the writ on the ground that the petitioner was afforded a remedy in the ordinary course of law—that is, by appeal. A rehearing was granted by this court in said proceeding and, on the twenty-fourth day of September, a decision was rendered and an opinion filed therein, affirming the views and the conclusion declared in the former opinion. (*Postal Telegraph-Cable Co. v. Superior Court*, 22 Cal. App. 770, [136 Pac. 538].)

On January 2, 1913, and while the proceeding on the writ above mentioned was still pending before this court, the New York corporation (the original defendant in the action) filed in this court its record on appeal from the judgment in said action. A motion was made by the plaintiffs to dismiss said appeal on the ground that the said corporation, having been, by the order granting the plaintiffs leave to amend their complaint, supplanted as party defendant to the action by the California corporation and was thereby altogether eliminated from the case, was not a "party aggrieved," within the contemplation of section 938 of the Code of Civil Procedure. This point was sustained and the motion to dismiss the appeal granted in an opinion handed down by and filed in this court on the ninth day of May, 1913. (*Altpeter v. Postal Telegraph-Cable Co.*, 22 Cal. App. 63, [133 Pac. 329].)

On the twenty-fourth day of October, 1912—almost six months after the time within which it might have appealed from the judgment had passed (Code Civ. Proc., sec. 939) the defendant served and filed a notice of motion to vacate the judgment on the ground that summons in said action had never been served on it and that, therefore, the court had never acquired jurisdiction of the person of said defendant. The notice further states as one of the grounds upon which

the defendant claims to be entitled to be relieved from the effect of the judgment through said motion that "said judgment was rendered against this defendant by reason of its mistake, surprise and excusable neglect."

Said motion was supported by affidavits, accompanied by a proposed answer to the complaint.

The court denied the motion and it is the appeal from the order denying said motion that the plaintiffs now move to dismiss.

The affidavits filed and used to support the motion are not controverted—that is, the record does not disclose a counter-showing upon the facts set out in said affidavits and, therefore, the verity of the facts so set forth stands admitted. These affidavits are by the president and general superintendent, the vice-president and superintendent, the secretary and treasurer and L. T. Hatfield, appearing on this appeal as one of the attorneys of the defendant. Each of the above-named officers of the defendant deposes that he was not served with summons or otherwise notified of the institution and pendency of this action. Mr. Blake, the president and general superintendent of the defendant, further deposes that, during all the times mentioned in his affidavit, he was the only person or officer of the defendant authorized to employ attorneys for said corporation; that he never at any time employed, retained, or instructed Mr. Hatfield to represent this defendant in this action until after the return of the verdict by the jury at the trial of said action; "that, after the trial of said action, and after receiving notice of the result of said trial, affiant employed J. S. Spilman, Esq., as attorney for said defendant, and L. T. Hatfield, Esq., as counsel; that said Spilman and said Hatfield were employed by affiant for the said defendant for the purpose of procuring relief from such judgment by having the same annulled or vacated or set aside by such proceedings as they might be advised to be proper in the premises." Blake further declares that Hearn and Elberg, respectively the vice-president and superintendent and the secretary and treasurer of the defendant, "are the only persons holding statutory offices of said corporation in the state of California," and that Jeremiah K. Beede, chief operator of the defendant at and in charge of its telegraph station at the city of Sacramento, and upon whom service of summons was made in this action as originally

commenced against the Postal Telegraph-Cable Company, of New York, has never at any time had any power or authority to transact any other business for or on behalf of the defendant than that involving the duties of chief operator as above explained; that said Beede has at no time been authorized or empowered to enter into any contracts or agreements for said defendant, or to bind it in any manner in any transactions except such as necessarily came within the scope of his duties as chief operator, "or to accept service of process against it, or to appear for it in any court, or elsewhere, or otherwise, or at all."

In his affidavit, Mr. Hatfield corroborates Blake as to his (Hatfield's) connection with the defendant and this action, declaring that he was never at any time employed or retained by the defendant or any of its officers to appear as attorney for said defendant in this action until after the trial thereof and the rendition of the verdict and judgment therein; that, after the trial of said action, he was employed by the defendant to take such legal steps as he might conceive to be necessary and appropriate to obtain for the defendant relief from the judgment entered against it in this action. He further deposes: "That the recitals in the judgment eventually entered in said cause, wherein it is set forth that affiant appeared as counsel for any defendant or in any manner whatever took part in said trial on behalf of defendant, are wholly false, as this affiant did not at any time take any part in the trial of said cause on any account whatever on behalf of said California corporation, or otherwise or at all, except in the matter of filing an answer by and on behalf of the New York corporation, and in aiding in impaneling a jury for the trial of the cause against said New York corporation, but did not offer any evidence on the merits of said cause at any time, but left the court room when the amendment to the complaint was allowed, as fully shown in the stenographic report of said trial, to which stenographic report reference is hereby made as part hereof."

The answer proposed and tendered by the defendant is verified and, in appropriate language, denies that the defendant caused the injury complained of in the complaint.

The reporter's transcript of the proceedings on the motion of the plaintiffs for leave to amend the complaint by substituting the California corporation for the New York corpora-

tion as defendant in the action was offered and admitted in evidence.

The said affidavits, together with the stenographer's transcript of the proceedings on the plaintiff's motion for leave to amend their complaint as above indicated, are contained in and authenticated by a bill of exceptions, and constituted all the proceedings had on the motion by the defendant to vacate the judgment.

The contention of the plaintiffs is that the determination of the question submitted here must be governed entirely by an inspection of the judgment-roll and not by a consideration of the affidavits and other evidence disclosing matters extrinsic to the judgment; that the only remedy which the defendant now has left to it for securing relief from the effect of the judgment is by a suit in equity, the time limited for an appeal from said judgment having expired at the time of the institution of the proceeding on the motion to vacate it. This position is sustained, it is claimed, by the proposition that, except in certain exceptional instances, within which, it is asserted, this case does not fall, a motion to vacate a judgment will not lie where, as was true here, the right of appeal from such judgment is available to the party against whom the judgment has passed. (Code Civ. Proc., sec. 939.) It is, of course, plainly manifest that, if such a motion cannot be entertained—that is, if an appeal from the judgment is the exclusive remedy—under the circumstances of this case, then an order denying such motion is not appealable, and in that view of the case before us the motion to dismiss the appeal would have to be granted, since, obviously, an order disallowing a motion which the court has no legal authority to entertain cannot be held to be among the orders from which the code provides that appeals may be taken.

The position of the defendant is, however, that, insasmuch as it was not served with summons, either personally or constructively, and, therefore, was not afforded an opportunity to file an answer or otherwise appear in the action, it was authorized by section 473 of the Code of Civil Procedure to interpose an answer to the merits of the action, and that necessarily, in order to answer, it was entitled to have the judgment first vacated on motion, on a showing that, because of not having been legally notified of the commencement of

the action, it had not answered to the merits thereof or otherwise appeared therein, said motion being made within one year after the rendition of the judgment.

We are of the opinion that the circumstances of this case show that the motion to set aside the judgment constituted one of the methods open to the defendant to obtain relief, if any it is entitled to, from the effect of said judgment, and are, therefore, further of the opinion that the motion was one which was proper to be made under the circumstances and which the court was, consequently, legally authorized to entertain, and that the order denying it is appealable. In reaching this conclusion, we have been governed solely, so far as the evidence is concerned, by the facts set forth in the affidavits filed and used by the defendant in support of the motion to vacate the judgment and the proceedings on the application for leave to amend the complaint so far only as they corroborate the said affidavits upon the proposition of fact in impeachment of the recitals of the judgment to the effect that, at the trial, the defendant was represented by counsel. Thus we have limited the consideration of the proceedings leading to the amendment of the complaint, as disclosed by the bill of exceptions, because we desire and intend to refrain from passing upon the main proposition in this case, to wit: whether the act of substituting the defendant for the New York corporation, the original defendant in the action, as the party defendant thereto, although allowed under the guise of an amendment to the complaint, in effect amounted to the institution of a new action, or, at all events, one in which service of summons was necessary to give the court jurisdiction of the person of the substituted defendant. We prefer that this question be left open, to be considered and determined upon a consideration of the appeal upon its merits.

The general rule is, of course, that the party aggrieved by a judgment or an order must take his appeal from such judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside. This rule is clearly explained and aptly illustrated by Judge Hayne, in his work on New Trial and Appeal, 2d ed. sec. 199, and the many cases therein referred to and examined.

It is also the general rule that the aggrieved party to a judgment must appeal to equity in the form of an independent suit for that purpose, where, the time within which he might have appealed therefrom having passed, he desires to set it aside for reasons extrinsic or collateral to the questions examined and determined in the action. (*Pico v. Cohn*, 91 Cal. 132, [25 Am. St. Rep. 159, 13 L. R. A. 336, 25 Pac. 970, 27 Pac. 537]; *French v. Phelps*, 20 Cal. App. 101, 111, [128 Pac. 772], and cases therein cited.) But there are exceptions to said rules. (*Title Ins. & Trust Co. v. California etc. Co.*, 159 Cal. 488, [114 Pac. 838]; *People v. Davis*, 143 Cal. 675, [77 Pac. 651].)

The legislature has seen fit to make provision for the application of some of these exceptions in section 473 of the Code of Civil Procedure, and, as stated, it is claimed by the defendant that the circumstances of this case bring it within the one-year clause of said section.

So much of said section as is important in the solution of the problem submitted by the motion now under consideration reads as follows: "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." This provision necessarily presupposes the right in the party to the action upon whom personal service of summons has not been had to have the judgment set aside preliminarily to the filing of the answer, for it would be absurd to say that a party defendant might, under the circumstances contemplated by that provision of the section, file his answer within the time specified and so join the plaintiff on issues of fact and proceed with the trial of such issues while there still exists a judgment against such party.

The question here, then, is: Do the facts and circumstances of this case bring it within any of the exceptions of the general rules above stated? Or, in other words, are the facts such as legally to entitle the defendant to invoke the provision of section 473, above quoted, to obtain relief from the judgment?

We can justly perceive none but an affirmative reply to that question.

The above quoted provision of section 473 was intended to mean something. It cannot be treated as a provision having no substantial or vital purpose in its enactment. The section plainly says that, where, from any cause, a defendant has not been personally served with summons, he may, within a year after the rendition of judgment, answer to the merits of the action. That, in such case, the defendant is not only entitled but compelled to show that he has not been personally served with summons, is an obvious proposition. The section does not, it is quite manifest, contemplate a new or an independent suit in equity to set aside the judgment in order to enable him to answer to the merits. It was, unquestionably, intended as a distinct remedy from and cumulative to that which may be had in a court of equity to annul a judgment, the time for appealing from which has passed. It does not, perhaps, always involve precisely a collateral attack upon a judgment, for under said provision the judgment may be set aside upon matters which are not strictly collateral thereto or which presumptively are included in the adjudication. But it is nevertheless an indirect attack. The provision undoubtedly means, as obviously does the preceding language of the section providing for the securing of relief in certain instances within six months after the act from the effect of which relief is desired has been done, that the relief so sought may be granted in a summary proceeding, as by motion on affidavits. This proposition is sustained by all the authorities notably *People v. Davis*, 143 Cal. 675, [77 Pac. 651], where it is said: "It is well settled that a court has no power to set aside or vacate on motion a judgment not void upon its face, *unless the motion is made within a reasonable time*, and it is definitely determined that such time will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure, *which in no case exceeds one year*. . . . The effect of these well-settled rules is that, unless the invalidity of the judgment is apparent from an inspection of the judgment-roll, the court rendering it has no power, *in the absence of application made within the time specified in section 473 of the Code of Civil Procedure*, to make any order vacating or setting aside such judgment, and the sole remedy of the aggrieved party, who may not, in fact, have been served, is to be found in a new action, on the equity side of the court. (See *Eichoff v. Eichoff*, 107 Cal. 42, [48 Am. St. Rep. 110,

[40 Pac. 24]; *People v. Temple*, 103 Cal. 447, [37 Pac. 414].)"

While the judgment here appears upon its face to be valid, the undisputed facts developed upon the motion to vacate it show: That the defendant was not served with summons either personally or constructively; that it had no opportunity to answer to the merits of the action; that a trial was had in its absence and without its having been represented thereat by counsel or otherwise; and that the judgment here complained of was, under those circumstances, entered against it; that the motion to vacate said judgment was filed and made within one year after the rendition of the same; that, with said motion, the defendant proposed and tendered an answer to the complaint, or "to the merits of the action."

We can conceive of no circumstances more strongly calling for the application of the one-year clause of section 473 of the Code of Civil Procedure than those shown by the affidavits filed on the motion to set aside the judgment here. Indeed, we may go further and say that if this is not a case in which a motion to vacate a judgment valid on its face will lie, under the terms of section 473 of the Code of Civil Procedure, then it would be difficult to form a conception of circumstances which will justify the application of the one-year clause of said section. That the defendant was, by reason of the circumstances under which the judgment was rendered against him in this action, deprived of an opportunity to make a bill of exceptions or other record which would present whatever meritorious grounds of objection which it might have to said judgment, is plainly manifest. (*Title Ins. & Trust Co. v. California etc. Co.*, 159 Cal. 488, [114 Pac. 838].) At the trial of the action upon its merits, the defendant, not being present or represented, had no opportunity to register objections to any of the proceedings.

But, says counsel for the plaintiffs, the code provision resorted to by the defendant for relief from the judgment applies to cases only where the service is constructive and judgment is, upon such service, taken by default, and in support of that proposition he cites section 199 of Hayne on New Trial and Appeal, and the cases referred to therein. We do not so understand the author of that learned treatise on the appellate practice, nor the decisions cited therein. It is true that Judge Hayne says (p. 1033) that "it seems that

there are cases not strictly *ex parte* which constitute exceptions to the rule. Of these are to be noted cases where the service was constructive, and the judgment rendered was a judgment in default. Of such class of cases was *De La Montanya v. De La Montanya*, 112 Cal. 101, 53 Am. St. Rep. 165, 44 Pac. 345, 32 L. R. A. 82." But we do not understand that thus it was intended to say or that the learned author does say that the application of the exception is confined to cases where constructive service has been had and a default judgment thereupon entered. The reason for applying the exception to such cases is, undoubtedly, because the defendant, in point of fact, has possibly not received notice of the action, and, therefore, had no opportunity to appear, defend, and so prepare a record. The same reason is no less forceful and applicable in a case where, as here, the defendant has not been served at all, and, so far as such defendant is concerned, a trial had without issue joined and without his presence thereat either in person or by a representative. A judgment entered under such circumstances cannot be said to be impressed with qualities superior to those of a default judgment entered on a constructive service of summons. Indeed, the judgment here, according to the evidence adduced at the hearing of the motion to vacate it, is no less a default judgment than one in a divorce action, in which testimony must be taken to support the allegations of the complaint even though, having been served with summons, the defendant makes no appearance. In truth, the case here is much stronger in support of the right of the defendant to seek relief under section 473 than it would be in support of the application of a defendant upon whom service by publication has been regularly had for similar relief from a default judgment, for, in this case, as seen, there was no service of summons at all.

We are unable to discern any just reason for holding that the defendant is not entitled to invoke the remedy provided by section 473 of the Code of Civil Procedure for setting aside the judgment obtained against it under the peculiar circumstances of the case as disclosed by this record.

The motion to dismiss this appeal is, accordingly, denied.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 26, 1914.

[Civ. No. 1601. Second Appellate District—July 30, 1914.]

COLUMBIA CRUDE OIL COMPANY (a Corporation),
Respondent, v. W. S. DEYO, Appellant.

APPEAL—ORDER DENYING MOTION TO RECALL EXECUTION—INSUFFICIENCY OF RECORD—DISMISSAL.—An appeal from an order denying a motion to recall and quash an execution, and from an order denying an application for an injunction restraining the sheriff from further proceedings under the execution, will be dismissed, if in lieu of a bill of exceptions settled by the court and exhibiting the alleged errors of the court in the proceedings, the appellant has incorporated in a typewritten copy thereof certain affidavits, telegrams, and letters, certified by the clerk to be true copies of such original documents on file in his office, and it does not appear that these documents were presented to the court or considered upon the hearing of the motions, or, assuming they were so offered and received, that other evidence was not offered and considered.

ID.—ABSENCE OF BILL OF EXCEPTIONS—AUTHENTICATION OF TRANSCRIPT. When a bill of exceptions is not adopted as a means for presenting the record on an appeal from such orders, the party appealing must, in having the record authenticated, comply with the provisions of section 958a of the Code of Civil Procedure, under which he must request a transcript of the evidence offered or received, to be settled and signed by the judge, after notice as therein provided.

MOTION to dismiss an appeal from the Superior Court of Los Angeles County. John W. Shenk, Judge.

The facts are stated in the opinion of the court.

A. C. Routhe, for Appellant.

Rupert B. Turnbull, for Respondent.

SHAW, J.—Motion to dismiss appeal from: 1. An order of the trial court denying defendant's motion to recall and quash an execution; and, 2. An order denying defendant's application for an injunction directed to the sheriff, restraining him from further proceedings under the execution so issued upon a judgment rendered in favor of the plaintiff in the action.

The motion is made upon the ground of the insufficiency of the record presented in support of the appeal.

In lieu of a bill of exceptions settled by the court and exhibiting the alleged errors of the trial court in the proceed-

ings, appellant has incorporated in a typewritten copy thereof certain affidavits, telegrams, and letters, certified by the clerk to be true copies of such original documents on file in his office. It does not appear that these documents were presented to the court, or considered upon the hearing of the motions so by the court denied. Nor, assuming they were so offered and received, is there anything in the record showing that other evidence was not offered and considered.

When a bill of exceptions is not adopted as a means for presenting the record on an appeal from such orders as those here involved, the party appealing must, in having the record authenticated, comply with the provisions of section 953a of the Code of Civil Procedure, under which he must request a transcript of the evidence offered or received, to be settled and signed by the judge, after notice as therein provided. No attempt, apparently, was made to follow the provisions of the statute in having the record so authenticated.

So far as shown by the record, no evidence was offered or received in support of the motions on which the orders of denial were made, and the purported record is not authenticated in the manner required by law, without which this court cannot consider the same.

The motion to dismiss the appeal is granted.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 28, 1914.

[Civ. No. 1246. Third Appellate District.—August 1, 1914.]

**HIRST PARKIN, Respondent, v. GRAYSON-OWEN
COMPANY (a Corporation), Appellant.**

**NEGLIGENCE — ORDINANCE REQUIRING HORSES TO BE HITCHED — TEAM
BREAKING AWAY AND INJURING PERSON IN STREET — INSTRUCTIONS
TO JURY.**—Where a driver leaves his team tied to a telephone pole
in the street while he takes lunch, and the team runs away and in-
jures the driver of another vehicle, there being an ordinance that no
person shall leave any horse standing upon any of the public streets

lided with the buggy in which the plaintiff, as driver, was riding with a doctor, overturning the buggy, throwing plaintiff to the pavement and injuring his knee.

"The driver of the delivery wagon, George Vincent, drove up in front of a restaurant on San Pablo Avenue, between 10:30 and 11 o'clock in the forenoon. Vincent had left the barn about 5 o'clock in the morning, and had completed his delivery. He was an experienced driver; was twenty-nine years of age, and for eight years had been a stage driver in Siskiyou County. He carried with him a hitching strap. He testified that he drove up to the restaurant, set his foot brake down hard and sufficiently tight to block the wheels, wrapped the reins three or four times around the brake, got down, snapped the snap of the hitching strap in the bit of the black horse, and tied it around the telegraph post. He further said that after he had ordered his luncheon he heard the report of a pistol. Before the driver could get to the door of the restaurant the pistol was fired again and the team broke loose.

"Vincent had previously testified that before he had gone into the restaurant he spoke to a small boy who had a toy pistol in his hand, and cautioned him not to fire.

"The strap that Vincent used for the purpose of hitching the horses was an ordinary hitching strap that had been patched, and there was considerable testimony at the trial as to this patching or repairing of the strap; plaintiff claimed that the strap was old and rotten, and insufficient for the purposes of a hitching strap.

"I. D. Tobin, a police officer, called by the plaintiff, testified that he was on duty that day, and before the runaway he noticed that the team was very nervous, and that the bay horse was crowding the black one up against the sidewalk. The black horse was pulling to and fro on the strap that he was tied to. 'I noticed that the black horse was tied.' On cross-examination this officer stated: 'There was nothing in the action of the horses, or in the way in which they were hitched, to arouse my suspicion that there was any danger at all. So far as I saw everything was all right.' He also testified on cross-examination that 'If the horse had not been properly hitched at that time it would have been my duty to have taken action in the matter. I did nothing. I saw how the horse had been hitched, how it was hitched at that

time. I patted the horse, he calmed down.' Immediately afterward the runaway occurred.

"Defendant complains that the lower court committed error in the instructions it gave to the jury, asserts that the case was not properly left for decision by the jury, and takes this appeal in order that the issues involved may be submitted to a jury under proper instructions."

1. It is contended that the court erred in giving the following instruction, number 22:

"If you believe from the evidence that in order to have properly secured the defendant's team upon the occasion in question a strap or rope should have been passed through the bit and around the neck of one or both of the horses in said team, then in such case I charge you that the defendant was guilty of negligence in merely snapping the hitching strap to the bit of one of said horses even though you further believe that said strap was entirely sound."

The evidence was that the strap was fastened in the bit of the black horse next to the telegraph post.

Appellant makes several objections to this instruction: A, That the court had no right to suggest to the jury how the horses might have been fastened—viz, by passing a strap or rope through the bit and around the neck of one or both; B, It was prejudicial to suggest that to secure the team the strap should have been passed around the necks of both horses; C, That the court in so charging disregarded the law of the case as laid down on the former appeal—157 Cal. 41, 48, [106 Pac. 210, 214], where the court said: "We consider it unreasonable to hold that when a team is left standing unattended the ordinance requires in any event that every horse constituting the team should be hitched"; D, The instruction leaves out the important things done by the driver, Vincent, to secure the team, i. e., in setting the brake down and wrapping the reins around it; E, The instruction in effect assumes that there is but one way properly to secure a horse, by passing the rope or strap around his neck and through his bit, and where there are two horses, the same should be done with both.

Appellant recalls the fact that at the former trial expert testimony was received upon the subject of hitching horses. At the present trial appellant says, in its brief: "Plaintiff

carefully refrained from calling experts at the time, and there was absolutely nothing said at the trial about passing a rope or strap around the horse's neck and through the bit." The brief states: "The court knew, and so did the jury, that the strap was snapped into the bit of the black horse, that it was not passed around the neck of either animal." It is contended that "the instruction contained an element nowhere found in the evidence and was not fair to the defendant." Also, that it was prejudicial "in that it suggested that to secure the team properly the strap should have been passed around the neck of both horses" and that the instruction "assumes there is but one way properly to secure a horse" or two horses where there are two, that is, by the way pointed out in the instruction; and finally that the instruction disregarded the law of the case as held in the former appeal above quoted. We have thus grouped the claims made in paragraphs of the brief marked A, B, C, and E. Assuming it to be true that there was no evidence at all as to hitching a horse by passing the strap through the bit and around the neck, the most that can be said of the instruction is that it suggests something entirely outside the evidence. The jury were told that *if they believed from the evidence* that in order properly to secure defendant's team a strap or rope should have been passed through the bit and around the neck of one or both horses, merely snapping the hitching strap into the bit of one of the horses would constitute negligence under the ordinance. The ordinance required that the horses should "in some way be properly secured either by hitching or being under the personal control of some person of suitable age." If, therefore, the evidence had convinced the jury that the horses could have been "properly secured" *only* in the particular way pointed out in the instruction, less than that—"merely snapping the hitching strap to the bit of one horse"—would have been a violation of the ordinance. But there was no evidence upon which to base the instruction and hence it seems to us that the only question is—Did it necessarily have a tendency to mislead the jury?

At defendant's request the court gave the following instructions:

"34. You are further instructed that the ordinance does not prescribe any particular manner of hitching—it does not prescribe that a rope should be used in preference to a leather

strap, nor does it prohibit the use of a hitching strap with a snaffle, nor does it prescribe the strap should be fastened about the animal's neck rather than to the bit. The ordinance merely requires the horse to be properly secured by hitching or that it be under the control of a person of suitable age. If you find that Vincent secured the horses in the present case by hitching them as a reasonable and prudent person using ordinary care, skilled in the handling of horses and experienced in driving would have done, then you would be justified in finding that the horses were properly secured by hitching, and for their subsequent breaking away and injuring the plaintiff the defendant would not be liable, and if you so find your verdict should be for the defendant.

"35. You are also instructed that the said ordinance does not in terms prescribe that where two horses attached to a wagon, as in the case at bar, are left standing in the street, both horses should be hitched; if you find that one of the two horses attached to defendant's delivery wagon was properly secured by hitching when Vincent, the driver, left the wagon and went into the restaurant, and that to properly secure both horses by hitching a reasonable and prudent man, skilled in the handling of horses and experienced as a driver, would have hitched but one horse, as was done by Vincent in this case, then your verdict should be for the defendant."

It will be observed that notwithstanding there was, as defendant claims, no evidence referring to passing the strap around the neck of one or both horses to "properly secure" them, the suggestion was found in these instructions and was as much out of place here as in the instruction complained of and appellant was equally responsible for the suggestion. Waiving that fact as immaterial in view of the want of evidence on the subject, it seems to us, conceding the instruction 22 should not have been given, that it was not necessarily misleading, for the instructions, 34 and 35, given at defendant's request, placed the matter very clearly before the jury and left them to decide upon the evidence before them whether the ordinance had been violated; the question of what would constitute the proper hitching of a horse was left with the jury as matter of common knowledge. (157 Cal. 41, [106 Pac. 210].)

The law of the case, enunciated in the former appeal, was that it was error to instruct the jury that it was negligence not to have properly secured both horses. Said the court: "We consider it unreasonable to hold that when a team is left standing and unattended the ordinance requires in any event that every horse constituting the team should be hitched." The instruction in question, as we read it, left the matter with the jury upon the evidence before them, and as there was no evidence with regard to passing the strap around the neck of one or both horses that feature was eliminated from the case.

That the instruction omitted the fact that Vincent secured the team by setting the brake and wrapping the reins around it was not error. Since the ordinance expressly provides that a horse "properly secured" must be hitched or left in personal control of some person of suitable age, the fact could properly be omitted. If, however, this fact should have been considered by the jury they had the benefit of it in the following instruction given at defendant's request: "If you find that upon driving up to the sidewalk upon dismounting to go into the restaurant, Vincent, the driver, set the brake hard, wound the reins around the brake and then fastened one end of the hitching strap, reasonably fit for that purpose, to the bit of one of the horses, and the other end to a post at or near the edge of the sidewalk, you must consider all these circumstances in determining whether the driver used reasonable care and caution to secure the horses in thus hitching them."

It is further contended that instruction numbered 22 is inconsistent with instructions 34 and 35 above quoted. If we are correct in our view of instruction 22, the jury were not called upon to consider the passing the strap through the bit and around the neck of one of the horses, because there was no evidence upon which to base a belief that such method of hitching was involved. Inconsistent instructions must be plainly misleading or confusing to make them prejudicial. Instructions 34 and 35 were given at defendant's request and were in themselves a correct and easily comprehended guide to the jury. We can discover no inconsistency between them and number 22, and, certainly none such as would justify a reversal of the case. Nor do we think, apart from any alleged inconsistency between these instructions, that instruction 22

was prejudicial, conceding error in giving it. If the jury believed from the evidence that the *only* way to have properly secured the team was to pass the strap through the bit and around the neck of one of the horses the court was justified in telling the jury that merely to snap the hitching strap to the bit of one of the horses would have constituted negligence. The latter part of the instruction must necessarily be correct following the assumptions of the first part of the instruction.

Respondent contends that the verdict can be sustained upon other acts of negligence independent of the method of hitching the horses or of the fact that but one horse of the team was hitched. Hence, if objectionable, the instruction complained of is without prejudice. It was alleged in the complaint and the evidence concerning it was made the subject of instructions, that defendant failed to furnish the driver of the team with a proper hitching strap. Vincent testified: "The hitching strap I had with me was a strap I had on the horses, the strap that broke when I had my runaway. It was the same strap that I found in the warehouse or mending room. The strap was sewn and there was a rivet in it also, one rivet. The strap was pared down. I should say that the strap had been used more in that portion than it had up next to the horse's bit; that it was some thinner from use." He testified that he "considered it to be a safe hitching strap" and saw nothing about it "to indicate that it was weak." He testified: "I mean to say that the strap was not weaker in the center by reason of this sewing together and paring of ends and thin from use. It was worn apparently a little bit. I do not mean to say that the thinning of the strap from use, if it had become a little thinner from use, would not weaken it at all; I do not mean that exactly. Certainly it was weaker after tying over this here sewed piece. . . . I riveted the strap together about a month after the accident. I have not used it since, not at all. It is now the same as it was immediately after the accident except that it is riveted together, and except that I have thinned down the edges there on riveting them together. Q. I understand you to say that the strap had been stitched as well as riveted once? A. Yes, it had. Q. What has become of the stitching? A. Well, I tore them off, smoothed them down when I riveted it together. The stitching went clear through both ends. It is now

lapped over further. I think I cut off two and a half inches from one piece where the snaffle was before I riveted it. The Court: You don't mean to say it is exactly in the same condition with the exception of the rivet, because a piece of it has been cut off? A. Well, I don't know how to express that. I cut off the piece where the stitching marks were." He was asked why he "did not leave it in the condition it was. A. Well, that is something I could not explain myself, and why I put the strap back together. I fastened them together not because I wanted to use the strap again, but simply because I wanted to fasten it together in order to hold both pieces together."

Respondent invokes the familiar rule that a general verdict found for a party litigant in a case imports a finding in his favor upon all the issues in the case, citing Hayne on New Trial and Appeal, section 236, and cases there cited. It is urged that if the verdict can be supported on the theory that the defendant was guilty of negligence in furnishing an improper hitching strap, it must stand. The court instructed the jury that if they believed from the evidence that defendant "failed to furnish its driver, George Vincent, with a hitching strap strong enough to properly secure its team when it should be left standing unattended on the public streets . . . and that while said team was left standing . . . it . . . became frightened by the firing of a toy pistol and broke loose by reason of being improperly secured and therefore ran away . . . then in such case your verdict must be against the defendant . . . " The correctness of this instruction is not challenged. We cannot say the jury were unwarranted in finding that the strap was not such as would properly secure the horses when hitched there with it. If it be conceded that the way Vincent secured the team was a reasonable and sufficient compliance with the ordinance, certainly the means used—the strap—should have been free from defects that would weaken or make it unsafe. The jury had the right to pass judgment upon this point and were not bound to accept the opinion of the driver that the strap was in his belief safe and sound. It is not necessary, however, to rest the decision upon respondent's contention and we do not pass upon it.

Some instructions were given (9, 10, and 14) which, appellant complains, related to the common-law duty of drivers of horses upon public streets, whereas the action is for violating

an ordinance requiring certain particular things to be done. Instruction 9 is illustrative of the other two: "The Grayson-Owen Company while operating its delivery wagons upon the public streets of this city, was in duty bound to exercise ordinary care, vigilance and foresight to prevent its teams from running away and injuring others upon the streets and using such streets in common with it." It was perhaps unnecessary to give these instructions in view of others dealing more directly with the immediate cause of the accident, but we cannot see that they were abstract statements of duty wholly dissociated from the facts of the case. If there were no ordinance requiring horses being used for delivery purposes in a city to be properly secured when left unattended, we think it would be negligence at common law to neglect this precaution against the happening of just such an accident as we have here. In a sense the ordinance is but the statement of a common-law principle. At any rate, it is plain enough to our minds that there was nothing prejudicially misleading in these instructions or calculated to divert the minds of the jury from the issues in the case. The instructions we think quite consistent with the ordinance.

Respondent calls attention to the fact that all the instructions objected to by appellant, particularly instruction 22, were given at the former trial and excepted to but were not commented upon in the opinion reversing the judgment. We have not felt at liberty to treat the points now made as "deemed to have been passed upon as without merit." The fact may have some significance, but no point in a case can be said to have been decided except the one specifically dealt with and such others as may be said to be necessarily determined by the decision of the point under discussion.

Error is claimed in the instruction given and in the instruction refused as to the effect of an independent intervening cause. It was alleged in the answer that a small boy discharged a pistol twice near the horses, frightening them and "causing them to spring forward and break said hitching strap causing them to run away; that said hitching strap was sound and was a perfect hitching strap" and the horses broke away from their fastening and ran "on account of the carelessness and negligence and thoughtlessness of said small boy in discharging said pistol and not otherwise." Defendant requested, but was refused, several instructions upon this sub-

ject, one of which will illustrate the point now made: "Damages cannot be recovered in an action for personal injuries, such as in the present one, when an independent act of another person, such as a boy's firing off a pistol near the horses intervened between the driver, Vincent's, leaving the team, and the injury to the plaintiff, if that injury would not have occurred but for such act."

Vincent testified that when he went into the restaurant to get his lunch he saw a small boy with a toy pistol standing on the sidewalk almost opposite his team; that he cautioned the boy not to snap the pistol; that, after entering the restaurant, he heard the report of the pistol and started immediately for his team and as he reached the door he heard another report and before he got through the door the horses broke loose. The court gave the following instruction: "I charge you that it is immaterial in this case, so far as plaintiff's right to recover damages is concerned, whether a small boy fired off a toy pistol, thereby frightening defendant's horse or not, provided you believe from the evidence that said horses were improperly and negligently hitched by a weak and defective strap and that they were able to break loose by reason of such improper and negligent hitching." Appellant relies upon a rule which when applied to a proper case may be said to be well settled—"that an injury is not actionable which would not have resulted from the act of negligence, except for the interposition of an independent cause." Respondent aptly replies that "counsel has lost sight of the fact that if the horses were negligently hitched by a weak and defective strap that this was a continuing act of negligence. Every moment the horses were so hitched the defendant was negligent. His negligence was continuing. Under such circumstances, the act of the boy in firing the pistol is not an independent act, but a mere concurrent act, and the defendant is liable notwithstanding." Among the cases, in our appellate courts, illustrating the principle are *Pastene v. Adams*, 49 Cal. 87, which was a case of piling timbers so that some of the ends protruded and when run into negligently were thrown down, injuring plaintiff; *Barrett v. Southern Pacific Co.*, 91 Cal. 296, [25 Am. St. Rep. 186, 27 Pac. 666], was a turntable case; *Spear v. United Railroads*, 16 Cal. App. 637, [117 Pac. 956], was the case of a collision between an express wagon and a street car.

The doctrine was quite exhaustively treated by Mr. Justice Henshaw in *Merrill v. Los Angeles Gas & Electric Co.*, 158 Cal. 499, 504, [139 Am. St. Rep. 134, 31 L. R. A. (N. S.) 559, 111 Pac. 534], where the plaintiff was injured by the explosion of gas which the defendant gas company had negligently allowed to escape and which was ignited through the negligence of the proprietor of the restaurant where the gas was escaping. After giving some examples to show the application of the principle involved, the learned justice says: "The cases serve to illustrate the true rule, which is that the independent wrongful act, to constitute the proximate cause of displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission."

The case here falls clearly within the class treated in *Merrill v. Los Angeles Gas & Electric Co.* If the horses were negligently hitched, and this negligence was the cause of the injury, defendant's liability cannot be escaped because of the contributory negligence of the small boy. As said, in the case last cited: "Each is and both are the proximate cause of the injury." The instruction given was a correct statement of the law and it was not error to refuse the instructions requested by defendant.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on August 31, 1914, and the following opinion then rendered thereon:

CHIPMAN, P. J.—No new points are made and, while it is not improbable that we have mistaken the force of defendant's principal objection to the judgment—namely, that instruction numbered 22 given by the court was prejudicial error—we see no reason for opening the case for further argument.

Appellant is in error in assuming that it was said in our opinion heretofore filed that this "is the fourth judgment and order denying a motion for new trial." The statement, as it appears in the opinion on file, is: "This is the second appeal

taken by the defendant in the case and is from the judgment and order denying motion for new trial." It was not our intention to express any opinion on the merits, for we had none, and feel quite sure that nothing in the opinion can be so understood; but, if so, we freely withdraw the same.

The petition is denied.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 30, 1914.

[Civ. No. 1225. Third Appellate District.—August 7, 1914.]

NORTHERN LIGHT MINING COMPANY (a Corporation),
Respondent, v. **BLUE GOOSE MINING COMPANY**
(a Corporation), Appellant.

MINES AND MINERALS—LEASE OF PROPERTY—ACTION TO RECOVER RENT OR ROYALTIES.—In an action by the lessor against the lessee of a gold mining claim to recover rents or royalties, a complaint which sets out the execution of a lease of mining property by the plaintiff to the defendant, the entry thereunder by the latter into possession of the premises, the extraction therefrom of a certain value of gold, the amount due the plaintiff under the lease and the payment of all such amount except a stated sum, no part of which has been paid, states a cause of action.

ID.—DEMAND OF PAYMENT—NECESSITY OF ALLEGING.—An allegation of a demand for the payment of the rent or royalties is not essential to the statement of such cause of action, if the lease is uncertain in not designating whether the rent is payable in gold dust or money, and also in failing to designate any particular day or place of payment.

ID.—FUTILITY OF DEMAND—WHETHER EXCUSES NECESSITY OF MAKING. The purpose of a demand in such a case is to afford the defendant an opportunity to comply with it without the annoyance and expense of suit, but when it appears from the answer that a demand would have been unavailing and a mere useless and idle ceremony, the law does not require it.

ID.—JUDGMENT UPON PLEADINGS—WHEN PROPER.—In such action a judgment on the pleadings is properly granted the plaintiff, if the

conclusion necessarily follows from the admitted facts that it is entitled to judgment for the sum claimed, notwithstanding a denial in the answer of any sum now due, owing, and unpaid to the plaintiff from the defendant, which denial involves a mere legal conclusion.

ID.—PLEADING—ALLEGATION IN ANSWER OF CONTRACT DIFFERENT FROM THAT DECLARED UPON IN COMPLAINT.—An allegation in the answer that after the defendant had notified the plaintiff of an intention to abandon the premises, and while the defendant was actually engaged in moving, the plaintiff employed the defendant to extract gold from certain blocks of unworked ground, lacks responsiveness and relevancy to the cause of action, in the absence of any allegation or circumstance showing that such agreement had any relation to the lease or was intended to modify or affect it in any manner. As a matter of pleading the defendant could not avoid a contract alleged in the complaint by answering that he had made with the plaintiff another and different contract.

ID.—ABANDONMENT OF LEASED GROUND—ALLEGATION OF CUSTOM.—An allegation in the answer of a custom among miners permitting a lessee to remove from the premises at any time he chooses, is also unresponsive to the complaint, if it does not appear how this custom could or did impair the right of the plaintiff to receive the rent or royalty provided for in the lease, or in what manner this custom affected the acts of the parties to the contract.

ID.—CUSTOM OR USAGE—WHEN NOT ADMISSIBLE TO VARY CONTRACT.—If the terms of the lease are plain as to the period during which mining operations were to be carried on by the lessee, no evidence of custom is admissible on the subject of abandonment of work before the expiration of the term. A contract cannot be varied by evidence of custom or usage; custom can be shown only when the terms of the contract are obscure or uncertain.

ID.—BREACH OF LEASE BY LESSEE—MANNER OF CALCULATING DAMAGES.—If before the end of the term the lessee abandoned work on the claim, and the lessor brings an action to recover royalties, in which the lessor proves the total number of cubic yards of gold-bearing gravel that the defendant could have mined between the date of the abandonment and the end of the season, the average gold value of the gravel per yard, and the best obtainable or market percentage of royalty for working the claim at the date of the breach or thereafter, damages figured on the basis of such evidence are not objectionable as being uncertain. Since the difficulty of ascertaining exactly how much the plaintiff was injured arose from the defendant's breach of contract, scant attention will be paid to its complaint that greater accuracy is not obtainable.

ID.—INTERPRETATION OF LEASE—PROVISION FOR CONTINUOUS WORK.—A provision in the lease that the defendant would work the properties "as steadily and continuously from the date of this lease as the weather and season of each year would permit during the aforesaid

term," did not warrant the defendant in discontinuing the work if it proved unprofitable or by reason of any custom alleged to prevail, but obligated it to continue operations during the entire term of the lease, except when prevented by the weather and season of the year.

ID.—ABANDONMENT OF MINE BY LESSEE—DUTY OF LESSOR TO WORK IT. Upon the abandonment of the mining properties by the lessee, the lessor was not required to work the ground, nor obtain another lessee to do so, but it had a right to rely upon the faith of the lessee pledged to the observance of all the terms of the lease, and to recover damages in case of default by the lessee.

ID.—CUSTOM OF MINERS—JUDICIAL NOTICE.—In an action by the lessor to recover from the lessee on account of the latter abandoning the mining properties, the court will not take judicial notice of a custom of miners that a lessee, in the absence of an express provision in the lease to the contrary, is authorized to cease work at his pleasure.

ID.—CONTRACT FOR WORKING MINING PROPERTIES—WHETHER LEASE OR LICENSE.—If the instrument under which the mining properties were to be worked is styled an "indenture of lease," designates the parties as "lessor" and "lessee," "grants, demises, leases and lets" unto the lessee for a term of years not only the right and privilege of mining but the land itself, provides for the payment of "rent" and contains the forfeiture and entry clauses and those against assigning or subletting which are usually found in leases, it will be regarded as a lease, not a mere license.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Fink & White, Metson, Drew & MacKenzie, and Horatio Alling, for Appellant.

W. S. Andrews, and A. H. Brandt, for Respondent.

BURNETT, J.—The complaint was in two counts to recover damages for different breaches of a written contract providing for the lease of certain gold mining claims in which plaintiff was the lessor and defendant the lessee. The first count was based upon defendant's failure to pay plaintiff the sum of \$2,611.68, the amount due as rent and royalty under the terms of said lease, and the second count sought damages for defendant's refusal to continue dredging on the demised premises for the balance of the term.

Respondent moved for judgment on the pleadings as to the first count and the motion was granted and from said order the defendant has appealed. There was a trial as to the second count and plaintiff obtained a judgment thereon for \$8,375, from which also defendant has appealed.

As to the judgment on the pleadings error is claimed for the following reasons: 1. That the first count of the complaint does not state a cause of action; and, 2. That the answer thereto states three complete defenses, to wit: there was no money due, there was an executed oral agreement modifying the lease, and a custom existed permitting the abandonment of leased mining ground.

The said first count, after alleging the incorporation of plaintiff and defendant and the execution of said lease, a copy of which is attached and made a part of the complaint, proceeds: "IV. That in and by said written agreement or lease the plaintiff granted, leased, demised and let unto the defendant for a period of three years commencing on the 10th day of May, 1907, and expiring on the 10th day of May, 1910, certain placer mining claims" (describing them).

"V. That in consideration of said lease the lessee, the defendant herein, covenanted and agreed with the plaintiff to enter upon said mining claims and premises above described and to work the same mine fashion with its steam dredger known as the 'Alpha' in a manner necessary to good and economical mining, so as to take out the greatest amount of gold and precious metals possible with due regard to the safety, development and preservation of said premises as workable mines; further, the defendant agreed to work all the gold-bearing gravel on said claims from rim to rim wherever it was practical to float said dredger and to *do said work as steadily and continuously from the date of this lease as the weather and season of each year would permit during the aforesaid term*; and said defendant further agreed to pay and deliver to said lessor as royalty and rent thirty-three and one third per cent of all gold and precious minerals extracted from said premises during any single year until the gross yield during any single year should have amounted to fifty thousand dollars and thereafter during said year to pay and deliver to said lessor as rent and royalty forty per cent of all gold and precious minerals extracted from said premises in excess of said fifty thousand dollars until the gross

yield during any single year should have amounted to two hundred thousand dollars; and defendant further agreed to pay to the plaintiff as rent and royalty for said premises fifty per cent of all gold and precious minerals extracted in any single year in excess of two hundred thousand dollars; these royalties to be so paid were to be of like assay as those retained by the lessee and payment was to be made at such time and place as the lessor, the plaintiff herein, should direct.

"VI. That thereafter, upon the execution and delivery of said agreement of lease, the defendant entered upon the aforesaid described premises and commenced mining thereon as aforesaid: that during the year 1909 the defendant extracted gold from said premises valued in the sum of sixty-two thousand eighty-four and 64/100 dollars; that of said sum of \$62,084.64 the plaintiff was entitled under its said contract to the sum of twenty-one thousand five hundred and 51/100 dollars. That the defendant has paid to the plaintiff the sum of eighteen thousand eight hundred eighty-eight and 83/100 dollars and no more; and that there is now due, owing and unpaid to the plaintiff from the defendant the sum of two thousand six hundred and eleven and 68/100 dollars."

In brief, then, the complaint sets out the execution of a lease of mining property by plaintiff to defendant, the entry thereunder by the latter into possession of said premises, the extraction therefrom of a certain value of gold, the amount due plaintiff under said contract of lease and the payment of all said amount except the sum of \$2,611.68, no part of which has been paid.

Upon a general view we would conclude that there are thus exhibited all the elements that are usually found and that the rules of pleading require in a cause of action like this. And it may be said that a deliberate consideration of the specific criticism of appellant does not disturb the impression created by a cursory reading of the complaint.

No allegation of a demand for the payment of the rent was essential to the statement of a cause of action. While the lease is somewhat uncertain as to whether the rent or royalty was to be paid in gold dust or bullion alone or in money, the more reasonable construction seems to be the one obviously placed upon the lease by the parties themselves and followed by the court below. The terms used in said lease would indicate that gold dust and money were considered as equiv-

alent and in the answer it is alleged, substantially, that appellant paid respondent as rent under the lease the sum of \$18,888.83. The construction of the lease adopted and acted upon by the parties to it should, of course, prevail where uncertainty exists as to the precise meaning of any of its terms. The lease also specified the time within which the payment should be made. While no particular day, for obvious reasons, is designated for payment the defendant was obligated "thereafter *during said year* to pay and *deliver* to said lessor as rent and royalty" the amount set forth. The precise time of payment and whether it should be made in more than one installment was left to the discretion of the defendant, but it is clear that the whole amount of the annual rent would be due at the end of the year and, if not paid, then an action would lie for its recovery, and this complaint was filed after the end of the year. The same result would follow whether the payment was to be made in gold dust, bullion, or money. Neither can it be said that the designation of a place for the payment was a condition precedent to the accrument of the cause of action. This was a privilege accorded to plaintiff but if it failed to exercise the option the payment should be made upon the premises. If defendant was withholding what was due on the ground that plaintiff had not designated a place for the payment, notice to that effect should of course, have been given by the former to the latter. The recital of the foregoing considerations shows that no demand for the payment or delivery of the amount claimed was required before plaintiff would be authorized to institute the action. It is simply the case of an amount clearly due under the terms of the contract when the complaint is filed and the situation is entirely different from those instances where the cause of action does not accrue until a demand for payment is made. The matter seems so simple as hardly to justify the citation of authorities although many cases are noted by respondent in support of the action of the court below as to this point.

Manifestly, also, as suggested by respondent, a demand would have been entirely futile. In its answer appellant denies that the lease bound it to work for the full term and also denies that there is owing to respondent any sum whatever. It also sets up what was conceived to be a perfect defense to the first count of the complaint. To be consistent, then, appellant would have refused to comply with any de-

mand for payment. But the purpose of a demand in a case like this is to afford defendant an opportunity to comply with it without the annoyance and expense of suit, but when it appears that it would have been unavailing and a mere useless and idle ceremony the law does not require it. (*Cox v. Delmas*, 99 Cal. 120, [33 Pac. 836].)

It is clear, therefore, that if any defect in that regard existed in the complaint it is shown by the answer to have been entirely without prejudice.

With no less certainty can it be affirmed that the court was justified, as to the first count, in awarding judgment to plaintiff on the pleadings.

It was alleged that gold of the value of \$62,084.64 was extracted in 1909. This was not denied in the answer. Of this it was alleged that plaintiff was entitled to \$21,500.51. This is a matter of computation based upon the terms of the lease. The execution of the lease and entry thereunder are not denied. The complaint alleges that respondent has received of this sum of \$21,500.51, on account of said rent, the sum of \$18,888.83 and *no more*. This is not denied in the answer. From the *admitted* facts, therefore, the conclusion necessarily follows that plaintiff is entitled to judgment for the sum of \$2,611.68. In view of the foregoing it is patent that the denial in the answer "that there is now due, owing or unpaid to plaintiff from defendant the sum of \$2,611.68 or any other sum or sums whatever" involves a mere legal conclusion arising probably from a misconstruction of the terms of the lease. The proper way to present an issue as to this material question was to set forth *facts* showing that plaintiff was not entitled to said sum of \$21,500.51 or to allege that the full amount had been paid.

Likewise there is no semblance of defense in the claim of an executed oral contract. There is a missing link between it and the written contract of lease upon which plaintiff relied. The allegation is "that after defendant had notified plaintiff of its intention to remove its dredger from said premises, and while defendant was actually engaged in the moving of its said dredger off the said placer mining claims, plaintiff, through its agents thereunto duly authorized, employed defendant to work out and extract the gold and gold dust from certain small pieces or blocks of unworked ground which had been left unworked by plaintiff in its theretofore mining

operations upon said placer claims, and which were covered with tailings and tailing piles; and in this connection plaintiff agreed to pay and deliver to defendant as compensation for working out said small pieces or blocks of unworked ground, eighty per cent of the gross product of gold derived therefrom" and that defendant accepted said employment and under this agreement took out gold of the value of \$13,543.36 and delivered to plaintiff twenty per cent thereof as agreed, but there is nothing to show that this contract was intended as a substitute for the one set out in the complaint or, indeed, that the two were related in any manner. We must assume that they were entirely disassociated and distinct. In other words, this declared defense utterly lacks responsiveness and relevancy to the cause of action. Of course, it is elementary that if the answer sets up an affirmative defense, it must state facts which are related to the facts averred by plaintiff and which constitute a defense thereto. (31 Cyc. 157.) In the absence of any allegation or circumstance showing that this oral agreement had any relation to the written contract or was intended to modify or affect it in any manner we must regard said oral agreement as a matter utterly extraneous and inapposite. "As a matter of pleading appellant could not avoid a contract alleged in the petition by answering that he had made with appellee another and different contract." (*Tyler v. Coleman* (Ky.), 97 S. W. 373.)

Other valid objections to the so-called defense are urged by respondent but we deem further inquiry as to this point unnecessary and inadvisable.

The third defense is equally without merit. The claim is that it was "a custom among miners of Alaska that unless it is specifically set forth in the lease that the lessee shall continue to operate the leased premises during the whole term for which the lease is given, a lessee is permitted and has the right to cease working under the lease, and remove from the leased premises whenever he chooses so to do."

This is also entirely unresponsive to the complaint. It does not appear how this custom could or did impair the right of plaintiff to receive the rent or royalty provided for in the lease or in what manner this custom affected the acts of the parties to said contract.

Besides, the terms of the contract as to the time of operation are plain enough and no evidence of custom would be admissible upon the subject. A contract cannot be varied by evidence of usage. Custom can be shown only when the terms of the contract are obscure or uncertain. (Code Civ. Proc., sec. 1870; *Withers v. Moore*, 140 Cal. 591, [74 Pac. 159].)

In dismissing this first branch of the case it may be said that no offer was made by defendant to amend its answer and we must assume that its defense was as fully set forth as the facts would warrant.

In considering the judgment on the second count we note preliminarily that during the seasons of 1907 and 1908 defendant operated under the terms of the written lease and the dredger was left at a certain point on the claim during the winter of 1908-9 and, on June 4, 1909, work was again started and continued till the 12th of August following. On August 11 preceding, the "manager" and the "managing owner" sent to plaintiff a telegram to the effect that unless the royalty were reduced to ten per cent operations would be suspended. The next day, without waiting for an answer, they abandoned operations and proceeded to move the dredger off the premises. On the way out they were engaged for five days in dredging a rich spot from which was realized quite a sum of money and, on September 1, they left plaintiff's property and did not thereafter return.

Plaintiff's theory, as stated by its counsel and as appears from the record, was that the defendant was answerable to it for the damage occasioned by the deliberate breach of its affirmative obligation to work the property. It is not disputed by appellant that it did abandon the work nor is it claimed that the ground into which the dredger was entering on August 12 was not dredgable or that the season prevented further operations. The sole contention of defendant seems to have been that it was justified in discontinuing the work for the reason that the remaining ground was not rich enough to enable defendant to dredge it at a profit and that if it continued work the dredger would be so far south at the end of the season that the whole of the next season would be lost in moving up stream to the scene of its next operations.

The measure of damage claimed by respondent was the *percentage* of the amount of gold that defendant could have extracted after August 12, 1909, had it operated until the end

of the season, obtained by deducting from the percentage of royalty provided for in the agreement the greatest obtainable or "market" percentage of royalty for working the property at the date of the breach or thereafter. The fairness of the rule is not called in question but it is claimed by appellant that no damage should have been allowed for the reason stated above.

In support of its theory plaintiff introduced evidence to show: 1. The total number of cubic yards of gold-bearing gravel that defendant could have mined between August 12 and the end of the season; 2. The average gold value of this ground per cubic yard, and, 3. The best obtainable or "market" percentage of royalty for working the claims at the date of the breach or thereafter.

The court found that, on August 12, 1909, there still remained on the premises over seventy thousand cubic yards of dredgable gold-bearing gravel which had not been worked; that there remained, excluding the five days that defendant used in dredging said rich spot, sixty-seven working days during which it could have mined the premises had defendant continued operations; that the capacity of the dredger was one thousand cubic yards per day; that the gold-bearing gravel which remained and could have been worked by defendant averaged in value fifty cents a cubic yard; that the greatest obtainable or market royalty for working the premises was, on August 12, the date of the breach, and at all times thereafter, not greater than fifteen per cent of the gross amount of gold extracted. It was further found that the defendant had extracted, under the lease, during the year 1909, gold of a value greater than fifty thousand dollars. By simple calculation, therefore, the conclusion was reached that plaintiff was entitled to damages in the sum of \$8,375.

As to these findings of fact it may be said generally that they are all supported by the evidence, some of which may appear in the consideration of some of the contentions of appellant.

There is no doubt that by the terms of the lease defendant bound itself to work continuously as far as the weather and the season of the year would permit. Otherwise, what do the following words mean: "To do said work *as steadily and continuously as the weather* and the season of the year will permit?" While it is not expressly provided that the work shall

continue until the end of the lease, this is necessarily implied in the use of the phrase "*from date of this lease.*" It is thus to be seen that no warrant exists for the contention that appellant might discontinue the work if it proved unprofitable or by reason of any such custom that was supposed to prevail. It could hardly be made to appear more clearly that appellant was obligated to continue dredging during the entire term of the lease except when prevented by the *weather* and the *season of the year*.

To what we have said as to custom may be added the consideration that no evidence whatever was offered at the trial in proof of such custom and it is not a matter of which the court would take judicial notice. (Code Civ. Proc., sec. 1875.)

As to the declared executed oral agreement, it was not pleaded to the second count of the complaint nor was there any evidence offered in its support and no further comment seems called for.

It is contended that plaintiff could have worked the ground itself or obtained a lessee to do so at a greater profit than it would have received from defendant if it had continued working to the end of the term. The finding of the court, however, is directly opposed to this view and it is amply supported by the evidence. Of course, it is true, also, that plaintiff was not required to work the ground but it had a right to rely upon the faith of defendant pledged to the observance of all the terms of the lease.

What has been said is probably a sufficient answer to the claim that the instrument under which defendant took possession of the premises constituted a mere license. It may be added that the instrument is called an "indenture of lease," the parties are named "lessor" and "lessee," that by its terms the lessor "grants, demises, leases and lets" unto the lessee for a term of three years not only the right and privilege of mining but the *land itself*, that it provides for the payment of "rent" and contains the forfeiture and entry clauses, and those against assigning or subletting, which are usually found in leases. When the intention of the parties to the instrument has been ascertained and there is nothing therein opposed to public policy the covenants must be observed, although it may develop that the bargain may be unprofitable to one or both of said parties.

The point is hardly worth further consideration and we need not refer to the many cases cited, but we add the following quotation from *Walker v. Tucker*, 70 Ill. 527, a similar case to the one at bar: "The courts must enforce contracts as the parties made them. They cannot super-add conditions or restrictions which the parties have not themselves thought fit to impose in making their contracts. There is nothing in this instrument which authorizes a suspension or abandonment of mining because it has become unprofitable. . . . It is elementary law that, when the contract is to do a thing possible in itself, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it for it was his own fault to run the risk of undertaking to perform an impossibility when he might have provided against it by his contract."

Respondent has also cited figures from the record to show that had defendant continued its operations under the lease till the end of the term it would at least have made a *reasonable* profit, but we deem this immaterial.

It is argued that the damages were so uncertain as to be impossible of ascertainment. Of course, reasonable probability is all that is required. To *demonstrate* the amount of the loss of respondent it would be necessary to dredge all the gold-bearing ground that could have been worked in the number of days that defendant was idle but should have been employed. This was impracticable, but great care seems to have been taken in furnishing the most satisfactory evidence that was available. The capacity of the dredger, the number of working days left and the character and quality of the unworked soil were inquired into and disclosed by the testimony of witnesses and these elements were made the basis of the court's conclusion as to the damage suffered by respondent.

But it is the doctrine of common justice, as well as of the authorities, that, since the difficulty of ascertaining *exactly* how much plaintiff was injured arose from defendant's breach of its contract, scant attention will be paid to its complaint that greater accuracy was not obtainable. It is said, in *Shoemaker v. Acker*, 116 Cal. 244, [28 Pac. 64], that "Progressive profits, as damages, present one of the most difficult subjects with which courts have to deal. It is not the law, however, that they can never be recovered. . . . But where

the prospective profits are the natural and direct consequences of the breach of the contract they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages," citing cases.

Another contention of appellant, in which it seems to have considerable confidence, may be stated as follows: During the five days defendant worked on the isolated rich spots it extracted gold of the value of \$13,545.36. Had it been working on the ground contiguous to that on which it was working, on August 12, it would have taken out, on the ground value found by the court, five hundred dollars per day or the total of two thousand five hundred dollars. The claim is, therefore, that it should be given credit for the difference between \$13,545.36, which it actually extracted, and two thousand five hundred dollars, which it would have extracted if it had worked according to its contract, or with twenty-two days' work, which would have been required to extract the larger amount from the cheaper ground. In either event the result would be to reduce the judgment by \$2,761, which is twenty-five per cent of \$11,045. The court, however, held that appellant was only entitled to a credit for the five days actually consumed in working the said rich spots out of the total of seventy-seven days remaining.

There can be no doubt of the soundness of the court's conclusion. It is not a question of the relative richness of the various spots of gold-bearing soil. Under the contract it was the duty of defendant to operate its dredger not only during the entire period that it was operated, but also for sixty-seven days additional. It is equally true that respondent was entitled to the specified percentage of what was extracted, however much or little, and of what *would have been* extracted had the work continued for the entire term. It was the good fortune of appellant to strike a rich spot, but its operation there was affected by the same terms of the contract as applied to the other ground. Appellant was bound to pay and deliver to respondent a certain percentage "of *all* gold and precious minerals extracted" during the entire season.

There is no more merit in the claim that since no witness testified directly that the unworked ground would average fifty cents per cubic yard in value, the finding to that effect is unsupported. It is not denied that one witness testified

that it would average fifty-five cents a cubic yard and another that it would average sixty cents a cubic yard, and it is therefore argued that the finding should have been in accordance with one of these figures or a less one, as testified by another witness. Since a higher value would have been supported, appellant is in no position to attack the finding of a lower value. The greater includes the less.

The various positions of appellant, when carefully examined, lead necessarily, we think, to the conclusion that this appeal is quite destitute of merit, and the judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1226. Third Appellate District.—August 7, 1914.]

E. SALO, Appellant, v. JOHN K. SMITH et al., Respondents.

FALSE IMPRISONMENT—ARREST OF PERSON SUSPECTED OF CRIME—DELAY IN PLACING MATTER BEFORE MAGISTRATE.—If a sheriff, believing a person has committed an assault with intent to murder, arrests him without warrant, but instead of promptly taking him before a magistrate as required by section 849 of the Penal Code, detains him awaiting the outcome of the injuries suffered by the victim of the assault, in order to know what charge to place against him, the detention is unlawful and the officer is liable therefor.

ID.—WANT OF PROBABLE CAUSE—INFERENCE FROM UNDISPUTED ALLEGATION—ADMISSION IN ANSWER.—In an action against the sheriff to recover damages for such arrest and detention an admission in the complaint that the defendant, in arresting and detaining the plaintiff, acted upon probable cause, removes any element of malice which might be inferred from a general undisputed allegation of an arrest effected without a warrant.

ID.—ABSENCE OF MALICE—CIRCUMSTANCES SHOWING—MITIGATION OF DAMAGES.—An allegation in the answer that the delay of the sheriff in preferring a formal complaint before a magistrate was due to uncertainty as to the nature of the charge which the circumstances might require should be made, whether that of murder or of assault to commit that crime, such uncertainty arising by reason of a doubt existing at the time of the arrest and for a long period thereafter as to whether the victim of the assault would recover from or succumb to the serious wounds inflicted upon him, shows the absence

of malice, and constitutes an element which the court is authorized to consider in mitigation of damages.

ID.—NOMINAL DAMAGES—WHEN PROPERLY AWARDED FOR FALSE IMPRISONMENT.—If the complaint merely alleges the wrongful detention, and damages in the sum of twenty-five thousand dollars, while admitting the absence of malice, and the court is not specifically apprised of the extent of the injury suffered from the detention, an award of nominal damages only is justified.

ID.—JUDGMENT ON PLEADINGS—NATURE AND EFFECT—PROVINCE OF COURT.—A motion for judgment upon the pleadings is, in substance, both a motion and a demurrer. While it is in effect a demurrer, because it challenges the sufficiency of the complaint to state a legal wrong, or that of the answer to state a legal defense, as the case may be, it, at the same time, operates as a motion for the reason that it is an application for an order for judgment, in which latter case the court becomes the exclusive judge of both the law and the facts.

APPEAL from a judgment of the Superior Court of Sonoma County. Emmet Seawell, Judge.

The facts are stated in the opinion of the court.

W. D. L. Held, and T. J. Weldon, for Appellant.

Clarence F. Lea, and T. J. Butts, for Respondents.

HART, J.—This is an action for damages for the wrongful detention of the person of the plaintiff, and grows out of the arrest of the plaintiff by the defendant, Smith, as sheriff, and the failure of that official to comply with the mandates of section 849 of the Penal Code, which provides: "When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and an information, stating the charge against the person, must be laid before such magistrate."

It appears that the defendant, Smith, was the sheriff of Sonoma County, and the defendant, surety company, surety on his official bond, at the times mentioned in the complaint.

The complaint alleges "that on the 2nd day of January, 1911, and within four months prior thereto, a felony had in fact been committed in the county of Sonoma, state of Cali-

fornia, to wit: The crime of assault with a deadly weapon with intent to commit murder; . . . that the defendant, John K. Smith, sheriff as aforesaid, had reasonable cause to believe the plaintiff to have committed the same." It is further alleged that, on the tenth day of October, 1910, said sheriff, by virtue of his duties as such officer, and without a warrant of arrest, took the plaintiff into his custody, in the city of Point Arena, in Mendocino County, and thereupon removed him from said county to the county of Sonoma, where he incarcerated him in the county jail of the latter county; that said sheriff did detain said plaintiff in said county jail and thus restrain him of his liberty until June 1, 1911, when, the plaintiff having been acquitted by a jury of the above-mentioned charge, said sheriff discharged him and restored him to liberty.

The gravamen of the plaintiff's complaint is then set forth as follows:

"6. That on said 10th day of October, 1910, there was in said city of Point Arena, and during all of the time intervening between said 10th day of October, 1910, and the 30th day of January, 1911, there was in said Santa Rosa, a magistrate, competent, willing, able and ready to have taken before him this plaintiff, and to have laid before him an information stating the charge against this plaintiff, and during all of said time, such magistrate was accessible and convenient, and this plaintiff was during all of said time, physically and mentally in a condition to be brought before such magistrate.

"7. That said defendant, John K. Smith, did not as such sheriff, or at all, take this plaintiff before any magistrate in the county in which he so arrested this plaintiff, or elsewhere, or at all, until January 30th, 1911, nor did said defendant as such sheriff, or at all, lay any information, stating the charge against this plaintiff, or any information against him at all, before said or any magistrate until January 30th, 1911; nor was this plaintiff at all taken before any magistrate until said January 30th, 1911; nor was any information at all laid against him until said January 30th, 1911; and in this behalf, plaintiff alleges that the delay in so taking him before a magistrate and in so laying an information against him, was unnecessary."

It is alleged that that portion of the restraint imposed by said defendant sheriff between October 10, 1910, and January 30, 1911, "and so much of said detention as occurred between said dates, was in excess of, and an abuse of the power vested in said defendant sheriff, as such," etc.; "that by so much of said detention as occurred between January 2, 1911, and January 30, 1911, this plaintiff has been damaged in the sum of twenty-five thousand dollars."

The joint answer of the defendants admits the arrest of the plaintiff under the circumstances as described in the complaint; admits that the defendant sheriff did not lay any information or prefer any charge against said plaintiff before any magistrate until January 30, 1911, and admits that, during all of the time the said defendant had the plaintiff in his custody, a magistrate was accessible and convenient; alleges that the defendant, sheriff, did not and could not know what charge to place against the plaintiff "for the reason that the person assaulted was dangerously injured and it was thought that he would not live, but would succumb to the injuries so inflicted upon him by the assault made upon him, and in that case the charge would have been murder, and that the delay in filing the complaint against said plaintiff was caused by the inability of the defendant, John K. Smith, to determine what charge should be placed against him"; denies "that by so much of said detention of plaintiff as occurred between the 2nd day of January, 1911, and January 30, 1911, said plaintiff has been damaged in the sum of \$25,000.00 or any other sum or at all."

When the cause was called for trial, the plaintiff, claiming that no legal defense to the cause of action alleged in the complaint was set up by the answer, applied to the court for judgment upon the pleadings. The defendants, admitting that a tort had been committed by the defendant sheriff against the plaintiff, consented to the motion, and the court thereupon rendered judgment upon the pleadings in favor of the plaintiff and awarded him nominal damages—the sum of one dollar.

This appeal is by the plaintiff from said judgment.

The complaint against the judgment is that the court abused its discretion in the matter of assessing damages, the contention being that, on the facts as disclosed by the pleadings,

the plaintiff was entitled to an award of substantial or compensatory, as distinguished from mere nominal, damages.

That the plaintiff was entitled, on the facts stated and admitted by the pleadings, to a judgment, is not and cannot be questioned. The only question is whether, under the facts, the trial court abused its discretion by awarding merely nominal damages.

No evidence showing the extent of the injury suffered by the plaintiff by reason of the tort or trespass complained of was presented to the court and the complaint merely alleges general damages. It does not set up special damages, or, as is said in the written opinion of the learned trial judge, filed on rendering the decision herein and which is incorporated in the record, "the complaint does not in a general way, or at all, state the business of plaintiff or that he suffered or sustained loss by reason of humiliation or disgrace, occasioned by said detention, or suffered from loss of time or inability in any way to follow the ordinary avocations of life. In other words, his station in life, earning ability or opportunities to earn money in any way whatsoever, are not alleged or suggested by the pleadings."

The complaint admits that the defendant, sheriff, in arresting and detaining the plaintiff, acted upon probable cause—that is, that he had reasonable ground for believing that the plaintiff had committed a felony—and this admission removes from said act of the sheriff any element of malice which might be inferred from a general undisputed allegation of an arrest effected without a warrant of arrest.

Thus it will be observed that the trial court was without the aid of facts more specific than those contained in the complaint upon which to form a judgment in the matter of the admeasurement of damages. In other words, the court was required to base its assessment of damages upon a general statement or charge that a trespass had been committed upon the person of the plaintiff and without being apprised of the extent of the injury suffered by the plaintiff. As the trial court said in its opinion: "The court had, and has, no means of knowing the moral character, standing or earning capacity of the plaintiff. The court did not even have an opportunity to observe him and knows nothing of his past or present history or of his prospects for the future. All that it can know of him, touching his character, even in a limited

degree, is the fact that there was reasonable cause to believe that he had committed an assault with intent to commit murder." With much force the trial court then inquires: "On such a statement as here presented should the court award to plaintiff nominal damages, or damages in the sum of \$100.00, or \$500.00 or \$5,000.00? Which of the three amounts would best comport with justice, without any evidence or suggestion touching the extent of his injury?" That the sheriff had the right to arrest and detain the plaintiff is not disputed, and the fact that that official did not immediately, upon making the arrest, formally charge the plaintiff with a felony, constituted nothing more than a technical trespass. The complaint does not say that the plaintiff would have been the better able to have released himself, at least temporarily, from his detention had the sheriff promptly complied with section 849 of the Penal Code; nor is it to be inferred from the mere general statement of the sheriff's failure to comply with said section that the plaintiff's condition, so far as his personal liberty was concerned, would have been any different from what it was. He was not precluded from applying for bail by reason of the fact that he had not been formally charged with the felony for which he was arrested and being detained. Indeed, it does not appear that he applied for or was refused bail. Moreover, it is an admitted fact—necessarily admitted by the motion for the judgment—that the sheriff's delay in preferring a formal complaint before a magistrate against the plaintiff was due to uncertainty as to the nature of the charge which the circumstances might require should be made—whether that of murder or of assault to commit that crime—such uncertainty arising by reason of a doubt existing at the time of the plaintiff's arrest and for a long period of time thereafter as to whether the assaulted party would recover from or succumb to the serious wounds inflicted upon him. While this fact constituted no defense to the action, it nevertheless showed an absence of malice and, therefore, constituted an element which the court was authorized to consider as in mitigation of damages.

It is true, as counsel for the plaintiff assert, that "physical inconvenience, mental suffering and humiliation of mind are all elements of general compensatory damages," and it is also true that evidence of such damages is admissible under the general statement of damage, or perhaps it is more ac-

curate to say, under a general statement of the tort or trespass. But, as has been made to appear, no evidence was offered in this case to show the extent of the injury following from the trespass alleged. And we may in this connection remark that, if this was a case in which it had been made to appear that the plaintiff's arrest and detention were without probable cause, then his position that upon a general statement in his complaint of such trespass, he would be entitled, as a matter of law, to substantial or actual damages, would doubtless be sustainable. But, as we have shown, this is not such a case.

The cases of *Lick v. Owen*, 47 Cal. 252; *Taylor v. Hearst*, 107 Cal. 272, [40 Pac. 392]; *Von Schroeder v. Spreckels*, 147 Cal. 186, [81 Pac. 515], and *Page v. Mitchell*, 13 Mich. 63, [86 Am. Dec. 75], are cited by the plaintiff in support of his position here. The three cases first mentioned were actions for libel and the Michigan case was one for an unlawful arrest. They are not in point here for at least two reasons: 1. In actions for libel, where, as in those cases, the publication is not privileged, the law implies malice (Civ. Code, sec. 47, and the cases above named), and in cases of tort, where the defendant has been guilty of oppression, fraud, or malice, actual or implied, the jury may, in addition to the allowance of actual damages, impose upon the defendant, exemplary damages, "for the sake of example and by way of punishing the defendant." (Civ. Code, sec. 3294.) 2. All the cases referred to were tried before juries and verdicts returned, and two of the libel cases and the Michigan case were reversed because of instructions limiting the juries to the finding of nominal damages only. In the other libel case the order granting a new trial was affirmed.

1. In this case there is no pretense that the act of the sheriff involved malice, either express or implied, or that oppression or fraud characterized it in any degree. To the contrary, as shown, the plaintiff himself absolves the defendant sheriff from any malice or imputation thereof in the act of arresting and detaining the plaintiff by alleging that such arrest and detention were supported by probable reason for believing that he (the plaintiff) had committed the felony for which he was so arrested and detained. 2. The case here was not tried before a jury to which it was necessary to submit instructions upon the law pertinent to the facts.

The trial court, in this case, in awarding judgment upon the pleadings, and assessing damages, acted in a dual judicial capacity. This proposition necessarily follows from the very nature of a motion for such a judgment. For a motion for judgment upon the pleadings is, in substance, both a motion and a demurrer. While it is in effect a demurrer, because it challenges the sufficiency of the complaint to state a legal wrong or that of the answer to state a legal defense, as the case may be, it, at the same time, operates as a motion for the reason that it is an application for an order for judgment. (31 Cyc. 606, and cases cited in the foot-notes.) It follows, therefore, as before declared, that the court in this action was required to exercise two different kinds of judicial functions: First, it was called upon to determine the question, purely one of law, whether the plaintiff was entitled to any judgment upon the pleadings, and second, having decided that the plaintiff was entitled to such a judgment, it was required to determine the question, which perhaps may be said to be one of mixed law and fact, as to the extent of the damage suffered by the plaintiff—that is, what damages, when measured in money, would satisfy the ends of the justice of the case as the same was disclosed by the facts before it. In other words, the latter function involved the determination of a question of mixed law and fact because said question, having been submitted to the court, required a determination by it of what damages in law the defendant was entitled to under the facts as disclosed by the complaint. But, in exercising that function—that is, in the determination of the *quantum* of damages—the court, in practical effect, acted in the place of a jury, and certainly it cannot be said that in that regard it was vested with any less discretion than a jury would have been had the case upon the facts been so tried and decided.

In this instance the court became the exclusive judge of both the law and the facts, and so was authorized to conclude and decide, as we think a jury would have been justified in concluding and deciding upon similar facts, under appropriate instructions, that, under the law, the facts justly justified the award of nothing more than nominal damages. If, to be more explicit, the case as it stands as to the facts had been submitted to the determination of a jury and a verdict for nominal damages returned, it could not well be argued that

this court could say, as a matter of law, that the plaintiff was entitled to substantial damages, and that the conclusion so reached by the jury was, therefore, erroneous or not warranted by the facts. As we view the case, the situation here, so far as is concerned the decision of the question of damages, which is a question of fact, is precisely the same as if said question were submitted to the arbitrament of a jury, and it is no more within the competence of a reviewing court to annul a judgment rendered and entered under such circumstances as are shown here than it would be to set aside a judgment entered upon the verdict of a jury founded upon facts similar to those to which the court was confined in the matter of the assessment of damages in this case.

Our conclusion is, as before stated, that the case as it was submitted to the trial court was one in which the conclusion was forced that the omission of the sheriff to make a formal complaint against the plaintiff, as required by the code section mentioned, involved nothing more than a mere technical trespass, from which the plaintiff could have suffered no substantial injury or actual damage.

The judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1227. Third Appellate District.—August 20, 1914.]

CALIFORNIA CANNERIES COMPANY, Respondent, v.
CANTON INSURANCE OFFICE, LIMITED, Appellant.

MARINE INSURANCE—CONTRACT OF INSURANCE—CERTIFICATE ISSUED BY BROKERS—INTERPRETATION AND EFFECT.—A document issued by a firm of insurance brokers to a shipper of canned goods by steamer, certifying that they have insured the goods with a designated insurance company for a stated amount, loss payable to the assured, or order, on surrender of the certificate, and that it is agreed that the certificate represents and takes the place of the original policy and conveys all the rights of the original policy holder for the purpose of collecting any loss or claim as fully as if the property

were covered by a special policy direct to the holder of the certificate, and free from any liabilities for unpaid premiums, is not the contract or part of the contract of insurance, but presupposes the issuance of a policy of insurance and necessarily puts the holder upon inquiry to ascertain the terms of the policy in order to determine what rights are secured thereby.

ID.—ACTION FOR INJURY TO INSURED GOODS—EVIDENCE OF POLICY OR ITS TERMS.—In an action against the insurance company to recover for injury to such insured goods, the policy itself, or evidence of its terms, should be introduced in evidence to show the risks that were covered by the insurance and the extent of the defendant's obligation.

ID.—AUTHORITY OF BROKERS TO ISSUE CERTIFICATE—INSUFFICIENCY OF EVIDENCE TO SHOW.—In this action by the holder of the certificate against the insurance company to recover for injury to the goods while in transit, the evidence is insufficient to show that the brokers were authorized by the insurance company to issue the certificate.

ID.—ENGLISH POLICY CONDITIONS—EVIDENCE TO SHOW MEANING OF EXPRESSION.—If the certificate shows that the insurance was in accordance with the "English policy conditions," the meaning of such expression becomes a proper and necessary subject of inquiry and testimony is admissible to establish such meaning.

ID.—WARRANTY AGAINST PARTICULAR AVERAGE—LOSS OF PART OF GOODS NOT SEPARATELY INSURED.—And if the contract of insurance, as thus established, shows a warranty free from particular average, there can be no recovery by the insured for parts of the goods, not separately insured, spoiled by leakage and afterward thrown away on the arrival of the vessel at its destination. In such event there is no total loss or a general average loss, but only a partial and particular average loss.

ID.—GENERAL AND PARTICULAR AVERAGE DEFINED AND DISTINGUISHED.—Particular average means a partial loss as distinguished from a total loss or a general average loss. General average is a contribution by the several interests engaged in a maritime adventure to make good the loss of one of them for voluntary sacrifice of a part of the ship or cargo to save the residue of the property and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred for the common benefit and safety of all the interests in the adventure.

ID.—SEPARATE INSURANCE ON VARIOUS LOTS—BURDEN OF PROOF.—If the insured in such a case contends that there was separate insurance on the various lots of goods, the burden of proof is on him to establish his contention.

ID.—COLLISION AT SEA—ADMISSIBILITY OF EVIDENCE CONCERNING.—In such action it is proper for the insurance company to offer evidence that the vessel in which the goods were shipped had been injured in a collision. This is a circumstance tending to show that the vessel

was unseaworthy within the contemplation of sections 2681 and 2682 of the Civil Code, and therefore that the implied warranty of seaworthiness was violated and no liability on the part of the defendant attached.

ID.—CERTIFICATE OF INSURANCE—SUPPLEMENTINE WITH THE PROOF OF POLICY.—If the insurer relies upon a certificate of insurance, on the injured goods “as per policy No. 76491 (English policy conditions), subject to all the terms and conditions of said policy,” the certificate should be supplemented by proof of the policy itself, if actually issued, or, if not actually issued, of the form of the policy to which the certificate refers.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Andros & Hengstler, and Golden W. Bell, for Appellant.

Asher, Myerstein & McNutt, and Barclay Henley, for Respondent.

BURNETT, J.—The action is on an insurance policy to recover damages caused by injury to certain canned goods shipped from San Francisco to New York. The alleged value of the goods was \$8,098.00 and plaintiff sought to recover the sum of \$2,567.95 and obtained judgment for \$2,500.00. As to the policy and the risks covered by it, we find in the complaint the following allegation: “That on the 17th day of December, 1909, at said city and county of San Francisco, the said defendant in consideration of \$121.47 to it then and there paid, executed to said plaintiff a policy of insurance upon said goods, whereby it promised to pay to the plaintiff within thirty days after proof of loss and interest, all loss and damage accruing to said plaintiff by reason of the destruction or injury of the said ship or of said goods during the ensuing voyage from the port of San Francisco to the port of New York; and wherein and whereby the said defendant undertook and promised to pay to the said plaintiff whatever damage should result to the said goods, occasioned by collision with any other vessel.”

As to this the answer contains the following: “Admits that, on the 17th day of December, 1909, at San Francisco,

defendant executed to plaintiff a certificate of insurance upon 2920 cases canned goods shipped on board the steamship 'J. L. Luckenbach' on her voyage from San Francisco to New York, but denies that it then or there promised, in said certificate, or at all, to pay to plaintiff, within thirty days after proof of loss and interest, or proof of loss or interest, or at all, all loss or damage accruing to said plaintiff by reason of the destruction or injury of said ship or of the said goods during the ensuing voyage from the port of San Francisco to the port of New York, and denies that defendant therein and thereby or therein or thereby promised or undertook to pay to plaintiff whatever damage should result to the said goods, by any perils of the sea; but, on this behalf, defendant alleges that it then and there promised to insure plaintiff in accordance with the terms and conditions of its English cargo policy, and not otherwise."

While the terms and conditions of the "English cargo policy" are not set forth in the answer it is clear that an issue was presented as to whether the particular loss claimed by plaintiff to have been produced by the perils of the sea was covered by the policy which was issued.

As to this, the policy being the basis and measure of defendant's liability, it was, of course, incumbent upon plaintiff to show that by its said undertaking defendant promised to indemnify against whatever damage was shown.

Recognizing this duty, the plaintiff introduced in evidence, without objection, what is denominated: "Certificate of Insurance effected by Bates & Chesebrough." From the face of this certificate we quote the following: "This is to certify, that on the seventeenth day of December, 1909, there was insured with Canton Insurance Office, Ltd., eight thousand and ninety-eight dollars for account of California Canneries Co. on 2920 cases canned goods as per back, valued at sum insured per Str. 'J. L. Luckenbach,' at and from San Francisco, Calif., to New York. Loss, if any, payable to assured, or order, on surrender of this certificate. It is understood and agreed that this certificate represents and takes the place of the original policy, and conveys all the rights of the original policyholder (for the purpose of collecting any loss or claim) as fully as if the property was covered by a special

policy direct to the holder of this certificate, and free from any liabilities for unpaid premiums.

“(Sgd.) BATES & CHESBROUGH.

“Not valid unless countersigned by

“(Sgd.)

“Countersigned

“J. SERVAES.”

On the margin of said certificate appear the capital letters: “F. P. A. E. C.”

On the back of the certificate were the following words and figures:

“A N. Y. 350 cases canned goods for	\$1015.00
“B N. Y. 300 “ “ “ “	810.00
“C N. Y. 500 “ “ “ “	1425.00
“D N. Y. 300 “ “ “ “	765.00
“E N. Y. 300 “ “ “ “	915.00
“F N. Y. 350 “ “ “ “	963.00
“G N. Y. 275 “ “ “ “	765.00
“H N. Y. 500 “ “ “ “	1275.00
“H. & F. N. Y. 45 “ “ “ “	165.00

2920

\$8098.00”

Julius Servaes was called as a witness for plaintiff to explain this document and after stating that he was in the employ of Bates & Chesebrough he testified: “That is a certificate issued by ourselves for insurance placed with the Canton Insurance Office. We handed that to Mr. Jacobs and received—and the Canton issued a policy themselves or certificate. Q. Well, which? That is the question, Mr. Servaes. You say a policy or certificate? A. Well, it was a certificate in this case, I think. Q. Yes, certificate, and that is the certificate, is it? A. No, this is our certificate. As you say, they were issued with the Canton Insurance Office. It says here distinctly, ‘It is understood and agreed that the certificate represents and takes the place of the original policy.’” After some discussion between counsel as to whether a policy was actually issued by the insurance company, and if so, what had become of it, defendant, through its attorney, stated that a certificate was issued by defendant and handed to plaintiff and that said certificate was as follows:

"Canton Insurance Office, Limited, of Hong Kong. Parrott & Company, agents, San Francisco. This is to certify that California Canneries Co. are insured to the amount of \$8098, valued at \$8098 United States gold coin, for account of concerned, on 2920 cases canned goods marked (blank) shipped on board the 'S. S. J. L. Luckenbach,' on her present voyage from San Francisco to New York as per policy No. 76491 (English policy conditions).

"This certificate is subject to all the terms and conditions of said policy; and in case of loss payment will be made only upon its surrender properly indorsed and receipted. Loss, if any, payable in San Francisco to assured or order.

"In witness whereof, the undersigned on behalf of the said Canton Insurance Office, Limited, have hereunto set their hands in San Francisco this 30th day of December, 1909.

"Signed, PARROTT & Co., General Agents.

"(Signed) R. H. MENZIES, Secy.

"Approved: J. J. THEOBALD, Manager."

The two foregoing are the only instruments received in evidence which, by any possibility, could be claimed to constitute a contract of insurance. Of course, neither constitutes a policy of insurance as that term is generally used and understood, but it is not uncommon for an insurance company to issue a certificate or memorandum of insurance which may answer the purpose of a more formal policy or may operate as a temporary expedient until the policy itself can be issued.

Of the foregoing certificates it was insisted by the plaintiff that the first, designated "Exhibit A," constituted the contract of insurance upon which the action was founded. It was declared by plaintiff's counsel that it was "the only paper respecting the insurance." Defendant's counsel insisted that "counsel show his contract. He has now introduced a document showing a part of his contract, and showing that on the face of it that this is not the whole contract; and I insist before any further evidence be introduced in this case that the contract, the complete contract, shall be shown." Then the record shows the following: "Mr. Henley. What do you mean by the contract? Mr. Hengstler. The contract that he sues on in this case, the contract of insurance. Mr. Henley. Very well. We sue on this certificate. Mr. Hengstler. Read that certificate. It shows on the face of it that it is incom-

plete. Mr. Henley. No, it don't. Well, the language speaks for itself." The second document as above set out was repudiated by plaintiff and, indeed, it was claimed that it had not been admitted in evidence. The sole reliance was based upon said Exhibit A.

But it seems clear that said "Exhibit A" does not purport to be nor is it a contract or part of a contract of insurance. Appellant's contention is that "Exhibit A" is a "mere memorandum made by Bates & Chesebrough, brokers for plaintiff, which informs its holders that Bates & Chesebrough have procured certain insurance upon certain goods from the Canton Insurance Office, Ltd. It does not purport to insure. It is simply a notice signed by Bates & Chesebrough, plaintiff's brokers, which certifies that they *have effected* insurance with a certain company. Such is the explanation of this instrument made by plaintiff's own witness, Mr. Servaes." This statement of appellant is true as far as it goes, but the certificate means a little more than that. It purports to assign or transfer to the plaintiff "all the rights of the original policyholder for the purpose of collecting any loss or claim." It thus presupposes the issuance of a policy of insurance and necessarily puts the plaintiff upon inquiry to ascertain the terms of said policy in order to determine what rights are secured thereby to the policy holder.

It is equally clear that the policy itself or evidence of its terms should have been introduced in evidence to show the risks that were covered by the insurance and the extent of defendant's obligation. Assuming that said exhibit was admissible against defendant, it manifestly does not constitute the entire contract and it refers to another instrument which must be considered as a part of the complete agreement.

Moreover, for said exhibit to be of any force and effect against defendant it was, of course, necessary to show that said defendant authorized the execution of said exhibit or else that the principle of estoppel can be properly invoked. On neither ground, however, can respondent's position be maintained. There is no contention of estoppel and the evidence is insufficient to warrant the conclusion that Bates & Chesebrough were acting as the agents of defendant. It is true that the following appears in the direct testimony of Julius Servaes: "Well, now, then, were Bates & Chesebrough authorized by the Canton Insurance Company to issue this

paper? A. Yes. Q. And pursuant to that authority you did issue the paper countersigned by yourself? A. Yes, sir." But his subsequent testimony shows that he was simply expressing his opinion as to the authority of Bates & Chesebrough. This appears from the following questions and answers: "Q. Mr. Servaes, does the Canton Insurance Company know anything of this memorandum that Bates & Chesebrough delivered? A. That I really don't know. I think I told them—of course, it has some—Mr. Henley (interrupting). I want to know in plain terms about it. Mr. Hengstler. Wait a minute. Let him first answer the question. A. Well, it is really rather hard to recall this. It is two years ago. I don't know whether I actually told them that we had issued the certificate or not as far as that goes. Mr. Henley. Q. I want to know now in plain terms were Bates & Chesebrough authorized by the Canton Insurance Company to issue that paper? A. That I couldn't tell you."

The only evidence to the point is directly opposed to the theory of respondent. Mr. Theobald, the marine manager for Parrott & Company, the Pacific Coast agents for defendant, testified that he had never seen "Exhibit A" "before today in this court," that his office had nothing to do with the issuance of it, and that Bates and Chesebrough were not authorized by the Canton Marine Insurance Office "to issue this kind of a document." He further testified that the other certificate to which we have already referred was the only one issued in this case by defendant. In fact, it seems quite apparent from the whole record that plaintiff must look to this certificate as the only basis for its cause of action. It is therefore vitally important that the terms of said certificate be understood and construed. That certificate shows that the insurance was in accordance with the "English policy conditions." What that expression means is then a *proper* and, indeed, a *necessary* subject of inquiry.

Mr. Theobald was properly permitted to explain this technical term and he declared that "all over the civilized world there is a standard form policy which was started in England, and which is used by all marine insurance companies, which is called the English cargo form policy. The main clause in this policy as well as I can recollect it is warranted free from particular average unless the vessel be stranded, sunk, burned, or the damage be caused by collision with another

ship or vessel. . . . And if I may be allowed to add to that, if the brokers required a different form of policy, what we call a policy of particular average design, they state on their application that they desire an English form policy, we will say, with a five per cent particular average clause added. . . . Q. In other words, if a merchant desires to insure his goods against partial loss there is a method of doing that, is there? A. By paying an additional premium at the time the risk is placed with the insurance company. And it is so stated on the application and on the certificate."

Indeed, it is not denied that the law of marine insurance has always recognized two distinct classes of insurance, one against *total loss only* and the other against *total or partial loss*, and this distinction finds expression in section 2711 of the Civil Code: "Where it has been agreed that an insurance upon a particular thing, or class of things, shall be free from particular average, a marine insurer is not liable for any particular average loss not depriving the insured of the possession, at the port of destination, of the whole of such thing, or class of things, even though it become entirely worthless; but he is liable for his proportion of all general average loss assessed upon the thing insured."

"Particular average means a partial loss as distinguished from a total loss or a general average loss." (26 Cyc. 670.) Many cases are cited by appellant to illustrate the distinction, among them being *Chadsey v. Guion*, 97 N. Y. 333, wherein there was a policy on one thousand six hundred and fifty barrels of potatoes, "warranted by the assured free from average unless general." The vessel arrived at its destination, and after one hundred and nine barrels had been unloaded it sank with the remainder on board. It was held that the insurers were not liable because of the warranty against particular average, there being no total loss.

"General average is a contribution by the several interests engaged in a maritime adventure to make good the loss of one of them for voluntary sacrifice of a part of the ship or cargo to save the residue of the property and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred for the common benefit and safety of all the interests in the adventure." (36 Cyc. 372.)

It is entirely clear that within the meaning of these terms there was here no *total* loss or a *general average* loss but only a *partial* and *particular average* loss.

As pointed out by appellant, the goods insured are alleged in the complaint to be "2920 cases of canned fruits to the value of \$8098" and the loss alleged is a particular average loss, to wit: "That . . . said vessel became leaky while at sea, which caused the waters of the ocean to flow into and around and upon said merchandise . . . which resulted in the determination and spoiling of said merchandise to the extent of \$2567.95, in which sum plaintiff has been damaged." The total damage was thus alleged to have been less than one-third the value of the goods and the evidence shows that *at most* 361 cases were totally lost. These, however, were thrown away after the vessel arrived at New York.

But, assuming that this loss was covered by the policy, it can be of no avail to plaintiff since there is no evidence that the various lots of goods were separately insured. There is no ground, therefore, for the contention that the F. P. A. clause should be separately applied to each of said lots.

"Where the subject matter insured is warranted free from particular average, the assured cannot recover for a loss of part, whether the policy be valued or unvalued, unless the contract contained in the policy be apportionable; but if the contract be apportionable the assured may recover for a *total* loss of any apportionable part." (Chalmers and Owen Digest of Marine Insurance, p. 119, 2d ed.) The only pretense for the contention that there was a separate insurance on the various lots of goods is based upon the said enumeration on the back of said Exhibit A; but, as already seen, that instrument does not constitute the contract of insurance between the parties. Moreover, upon the assumption that there was a separate insurance upon the various lots, there is no evidence that the said 361 cases constituted all of one of said lots, in other words, that there was a total loss of any of said lots. The burden of such proof is, of course, upon plaintiff. (*Merchants Mut. Ins. Co. v. Wilson*, 2 Md. 217.) It is equally clear that the evidence does not take the case out of the operation of said F. P. A. clause. The only pretense to the contrary is found in the suggestion that the damage was caused by a collision.

In the first count of plaintiff's complaint it was alleged "that said vessel while in the bay of San Francisco was run into and collided with the steamship 'Tallac'; that according to the information and belief of plaintiff said collision resulted in weakening one of the plates in the hull of the said steamship 'J. L. Luckenbach.'" While not expressly alleged, it must have been known to plaintiff that this collision took place before defendant insured said cargo. Plaintiff virtually admitted such to be the fact when it confessed the demurrer to the first count on the ground that it did not state a cause of action for the reason "that the allegations showed that the vessel 'J. L. Luckenbach' was unseaworthy at the beginning of her voyage." The trial was had on the second count of the complaint which contains no allegation as to said condition. The answer does allege, indeed, the collision as follows: "And in this behalf defendant alleges, on information and belief, that said steamship 'J. L. Luckenbach,' when she left the port of San Francisco, with plaintiff's merchandise on board, was in an unseaworthy condition, one or more of the plates in her hull having been weakened and damaged by a collision previously sustained," but, manifestly, this affords no warrant for the intimation that the collision occurred after defendant's liability arose. Indeed, respondent can hardly be serious in the claim since it objected to any evidence as to when the collision took place.

In this connection it may be said that we see no reason why it was not proper for defendant to offer evidence that the vessel had been injured in a collision. This would be a circumstance tending to show that the vessel was unseaworthy within the contemplation of sections 2681 and 2682 of the Civil Code, and therefore that the implied warranty was violated and no liability of defendant attached.

Other important points are made by appellant but we deem consideration of them unnecessary, further than to say that no judgment for appellant can be directed here upon this record. The findings support the judgment rendered for plaintiff but they do not warrant nor could they support a judgment for defendant. The most important question that we have considered, of course, relates to the insufficiency of the evidence to support a material finding of the court, and that error can be corrected only on a new trial.

We may suggest, in conclusion, that if on a new trial plaintiff cannot show that "Exhibit A" was authorized by defendant and it must rely upon the certificate admittedly executed by defendant, this certificate should be supplemented by proof of the policy itself if actually issued or, if not actually issued, of the form of the policy to which said certificate refers.

We think the judgment and order should be reversed and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

[Orim. No. 267. Third Appellate District.—August 26, 1914.]

THE PEOPLE, Respondent, v. W. J. PARRISH, Appellant.

CRIMINAL LAW—RAPE—FEMALE UNDER AGE OF CONSENT—EVIDENCE OF SUBSEQUENT ACTS OF INTERCOURSE.—In a prosecution for rape upon a female under the age of consent evidence is admissible not only to prove the act of intercourse charged, but subsequent acts, though committed after she reached the age of consent.

ID.—INTERCOURSE WITH OTHERS—FIRST ACT BY DEFENDANT—HARMLESS ERROR IN ADMISSION OF EVIDENCE.—It is immaterial in such case whether the defendant or some other person first had intercourse with the prosecutrix, and hence she should not be allowed, over objection, to testify that the act charged in the indictment was the first act of intercourse, but error in admitting such testimony is not prejudicial in the presence of other evidence tending strongly to show the defendant's guilt.

ID.—MARITAL RELATIONS BETWEEN DEFENDANT AND HIS WIFE—EVIDENCE TO SHOW THEIR CONTINUANCE.—It is not prejudicial error to refuse to allow the defendant to elicit from the prosecutrix on cross-examination that the relations of the defendant and his wife were friendly, in order to show the improbability of the story of the prosecutrix that the defendant had daily intercourse with her for a year while his relations with his wife were unaffected, if he is permitted to show by his wife that his cohabitation with her was uninterrupted during such period.

ID.—CONDUCT OF DEFENDANT TOWARD PROSECUTRIX—ADMISSION OF TESTIMONY IN REBUTTAL.—Testimony as to the conduct of the defendant at different times toward the prosecutrix, offered in rebuttal instead of in chief, is not prejudicial if his conduct is otherwise shown.

ID.—CORROBORATION OF PROSECUTRIX—WHETHER NECESSARY.—In a prosecution for rape upon a female under the age of consent, corroboration of the prosecutrix is unnecessary.

ID.—IMPROBABLE TESTIMONY—WEIGHT A QUESTION FOR JURY.—A witness may testify in such prosecution that on one occasion the defendant had intercourse with the prosecutrix in the plain view of the witness, the weight of such testimony being for the jury.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—REFERENCE TO IMPROPER MATTER.—In such prosecution it is misconduct, but not such as to require a reversal of the judgment of conviction, for the district attorney, in his argument to the jury, to remind them of a fact which the court in effect has previously told them they must not consider, and thereby seek to influence them by an unworthy appeal to class prejudice.

ID.—EVIDENCE OF SUBSEQUENT ACTS OF INTERCOURSE—PURPOSE OF ADMITTING—INSTRUCTIONS.—A charge to the jury that "you are further instructed, that evidence of subsequent acts of sexual intercourse between the defendant and the prosecutrix, and of improper familiarity on the part of the defendant toward and with the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence solely to prove the disposition of the defendant herein toward G. and as having a tendency to render it more probable that the act of sexual intercourse charged in the information (indictment) was committed by the defendant on the person of said G., and is to be considered by the jury for that purpose only and for no other," is not so prejudicial as to warrant a reversal of the judgment.

APPEAL from a judgment of the Superior Court of Butte County and from an order refusing a new trial. H. D. Gregory, Judge.

The facts are stated in the opinion of the court.

W. H. Carlin, and L. G. Faulkner, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

CHIPMAN, P. J.—Defendant was convicted of the crime of rape, having had sexual intercourse with one Gertrude Genant, a girl under the age of consent, and was sentenced to state's prison for the term of fifteen years. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

There is no distinct claim in defendant's brief that the evidence was insufficient to justify the verdict, although it is suggested that much of it is unworthy of belief. The claim is, rather, that defendant did not have a fair trial because of certain alleged errors in the rulings of the trial court and of the alleged misconduct of the district attorney in his address to the jury. Some objections are also urged to the instructions to the jury.

The prosecutrix was fifteen years old on March 4, 1912, and the sexual intercourse complained of was alleged to have occurred on or about June 20, 1912, at the county of Butte. Defendant and his wife conducted a boarding and lodging house in the city of Chico. The prosecutrix went to work for the defendant and his wife, about May 28, 1912, and continued in their service until some time in August of that year, when she left, returning after a week or ten days and remained until in January, 1913, when she went away again and was gone about three weeks, returning and remaining until some time in May, 1913, when she left finally because of some trouble she had with defendant's wife. The story of her conduct while at the Parrish House presents a case of shocking moral obliquity scarcely believable in one of her apparent intelligence. She testified that she at first roomed with another of the hired girls, one Annie Hansen, who left about three weeks after the prosecutrix went to work, and she slept alone until Olive Patterson came, she thought two or three weeks after the Hansen girl left. It was after the Hansen girl left and before the Patterson girl came that the first act of sexual intercourse with defendant is claimed to have taken place. She testified: That in the afternoon, toward evening, defendant, his wife, and some of the men boarders were assembled on the porch of the house; that some of the men, she did not know who, sent for beer and that she drank as much as eight glasses without becoming intoxicated. "After supper he (defendant) wanted me to go to my room with him, and I wouldn't do it, and he asked me if I had ever had intercourse, and I told him no, and he told me that he would show me how, that I was old enough to learn." She was asked if anything happened to her during the month of June, and answered: "After Annie Hansen left, Parrish came in there one morning. He came in and turned on the light, and pulled back the covers, and used me just as he

wanted to," which she explained to mean that he had sexual intercourse with her and that it happened before the Patterson girl came. As stated by the district attorney, "to show the disposition of the parties on the subject," and over defendant's objection, the prosecutrix testified that this sort of intercourse was kept up between them during her stay at the Parrish house and up to the time she finally left, "maybe it would be every other day, or maybe once or twice a day, or maybe every day, maybe once a week." Without objection, she testified as follows: "Q. And is it not a fact that you had sexual intercourse with several other men during that time? A. Yes, sir. Q. Where? A. At the Parrish House. Q. Always? A. Yes. Q. And did these young men room at the Parrish House? A. Yes." It appeared, in the course of her examination and cross-examination, that some six or seven men had these same relations with her, on account of which two of them are serving sentence in the state's prison. She was very searchingly cross-examined, the result being to show a depraved condition of mind, but not necessarily discrediting the incriminating features of her story. Some corroborating circumstances were shown, such as kissing and hugging of the prosecutrix by defendant, and one instance where the witness, Mrs. Marshbank, testified to having seen the parties in the act of copulation. This is said to have occurred in April, 1913, after the prosecutrix had passed her sixteenth year, and the evidence is made the subject of alleged error which will hereinafter be noticed. The defendant testified in his own behalf and flatly contradicted the prosecutrix as to his relations with her and denied ever having carnal knowledge of her. There was testimony by defendant's wife and by several lodgers and boarders to the effect that they never "saw anything out of the way" between the defendant and the Genant girl, and Mrs. Parrish testified that she saw nothing to arouse her suspicions that anything wrong was going on between them. It was very satisfactorily shown, and much reliance is placed upon the fact by defendant's counsel, that the Patterson girl came to the Parrish House not later than two or three days after the Hansen girl left, disputing the prosecutrix, who testified that it was two or three weeks. It will be observed, however, that she testified that she did not remember exactly how long it was, but she was positive that the first act of intercourse occurred

after the Hansen girl left and before the Patterson girl came, and while she was sleeping alone. It was for the jury to reconcile whatever conflict appeared in the testimony, and we find no warrant in the record for disturbing their finding upon the important fact that sexual intercourse took place between the parties as alleged in the indictment.

1. Defendant's first point is that it was error to allow the prosecution to prove not only the act charged but subsequent acts. It is admitted that, in *People v. Castro*, 133 Cal. 11, [65 Pac. 13], the contrary is held, but it is claimed that what was there said was *obiter*, and non-concurred in by one of the justices. Attention is called to the objection made to the testimony of Mrs. Marshbank, who testified to having seen defendant and the prosecutrix in the act, in May, 1913, after the prosecutrix had passed the age of sixteen. Upon this latter fact we cannot see that the matter of her then age would make any difference in respect of showing the carnal disposition of the parties for which alone it was admissible. It was while the prosecutrix was at the Parrish House, and was but one of an unbroken series of like acts from about May 20, 1912, for nearly a year. Upon the point raised, however, the rule is as stated in *People v. Castro*, 133 Cal. 11, [65 Pac. 13].

It is well settled that evidence of similar acts of sexual intercourse, both before and after the act charged, is admissible. (*People v. Gregory*, 8 Cal. App. 746, [97 Pac. 912]; *People v. Soto*, 11 Cal. App. 436, [105 Pac. 420]; *People v. Jacobs*, 16 Cal. App. 480, [117 Pac. 615]; *People v. Williams*, 133 Cal. 168, [65 Pac. 323]; *People v. Matthews*, 139 Cal. 530, [73 Pac. 416]; *People v. Keller*, 142 Cal. 624, [76 Pac. 500].)

2. Without objection from defendant, the prosecutrix testified to similar acts during the time she was at the Parrish House with several other men rooming there. Defendant says of this that "necessarily the defense did not and in the nature of things would not object to such testimony" inasmuch as "it tended to show the degraded character of the prosecutrix and later on, as will appear from her cross-examination, she unblushingly admitted a course of conduct on her part with other persons which was and is almost unparalleled." Immediately following this testimony the following question was asked of the prosecutrix: "Q. When was the first time that

you performed an act of sexual intercourse with any one?" The question was objected to but was allowed, and the witness answered that the act charged in the indictment was the first. It was strongly urged that this was very damaging testimony and gravely prejudicial, citing *People v. O'Brien*, 130 Cal. 3, [62 Pac. 297]; that it placed the defendant in the position of having seduced the girl and having made a common prostitute of one of prior chaste character. It was immaterial whether defendant or some other person first had sexual intercourse with the prosecutrix, and the objection should have been sustained. It will be recalled that the prosecutrix testified, without objection, that she told the defendant that she never had sexual intercourse when solicited by him and he replied that she was old enough to learn and that he would teach her. She was then not under oath as when she replied to the question now objected to. It was error to allow the question, but, in view of the evidence tending strongly to show defendant's guilt, we do not think the defendant was prejudiced by the answer.

3. Upon cross-examination of the prosecutrix the following question was asked by defendant, objected to by the district attorney and the objection sustained: "Q. As you observed it there, what were the relations of Mr. and Mrs. Parrish—were they friendly—did they get along well, as you saw it?" The objection was that the question was immaterial and incompetent. The purpose of the question, as is claimed, was to show the improbability of the prosecutrix' story of daily sexual intercourse with defendant while his relations with his wife were unaffected; that her story was "a sexualogical impossibility." The defendant was permitted to show, by the testimony of Mrs. Parrish, and did show very clearly what he sought to show rather vaguely by inference in the question objected to,—namely, that cohabitation was uninterrupted between them. We discover no prejudicial error here. Defendant seems to have been a man of extraordinary virility if the prosecutrix is to be believed.

4. Witness Millie Reese, over objection, was permitted to testify in rebuttal that on one morning when she and the prosecutrix were in bed together, the defendant came into their room "and pulled the covers down off their heads." The objection is that it was not admissible at all, but if admissible should have been offered in chief as it was in no sense

rebuttal. Another witness in rebuttal, Mrs. Roberts, was asked whether or not she saw anything familiar or any improper conduct between Mr. Parrish and Gertrude Genant. An objection was overruled and she answered: "He seemed to think a lots of the girl and he was always picking at the girl and playing with her, and I have seen him pick her up in his arms." The testimony of these witnesses can hardly be said to be legitimate rebuttal, and such as it was should have gone in as part of the case in chief. But we cannot see that it was of much importance in view of the conduct of defendant otherwise shown.

5. The principal corroborating testimony was given by Mrs. Marshbank, above referred to, and is particularly attacked as wholly unworthy of belief. She testified that one afternoon defendant came into the room then occupied by her and the prosecutrix, invited the latter to go with him into the next room, which she did, and, without closing the door behind them and in plain view of witness, he forthwith had sexual intercourse with the girl. The alleged improbability is two-fold—the shamelessness of defendant and gross immodesty of the witness in standing by as a looker-on. It is not essential that the prosecutrix be corroborated, and hence this testimony may be rejected. We may remark, however, that, in view of testimony given that the Marshbank woman was discharged for having been caught in like performances with a lodger of the Parrish House, and in view of the evidence as to defendant's immoderate passion, the jury, without much stretch of the imagination, might have believed the testimony of this woman, nor is it entirely improbable that this witness saw what she said she did. At any rate, it was admissible, and whether believable was with the jury.

6. Among the assignments of error is the alleged misconduct of the district attorney. When the prosecutrix was being examined in chief, she was permitted, over defendant's objection, to testify that Van Noy and Reitz (two of defendant's lodgers) had committed acts of sexual intercourse with her. "Q. And they are now paying the penalty for it? A. Yes, sir." The court sustained an objection to this question and answer and instructed the jury "not to consider it. Leave that entirely out of the case." When he was addressing the jury the district attorney, alluding to these other convictions, said: "Ask yourselves why the little fellow should suffer when

the man who runs the house—Mr. Carlin (interrupting): Note an exception to this statement. There is no evidence on it at all. We ask the court now to instruct the jury, and reprimand the district attorney for this statement. The Court: Gentlemen of the jury, you will not consider anything that is not in the evidence. You will remember the evidence, and try the case solely, as I told you, upon the evidence and the instructions of the court and nothing else." It is complained "that the court declined to instruct the jury to disregard such statements, simply stating that they were to consider nothing but the evidence. That wasn't curing the error. It was dodging it and you will note that the district attorney continuing his argument follows up practically the same line and finally in the middle of page 200 says: 'Are you going to say that the big fellow who has the money and brings for counsel the shrewd, keen, clever, calculating Carlin, is going to get away with it? . . . twenty dollar tears, that's all.' " Testimony had gone before the jury without objection that the prosecutrix had cohabited with several men other than defendant. Had the question above noted stopped with naming Van Noy and Reitz defendant could not complain, but apparently the object was to enable the district attorney to get out the fact that these men were suffering imprisonment and thus lay the groundwork for his appeal to the jury against allowing the defendant to escape because he had money to employ able counsel. But the court had sustained the objection and the district attorney was guilty of grave impropriety in reminding the jury of a fact which the court in effect told them they must not consider, and seeking to influence them by an unworthy appeal to class prejudice. In a case of considerable doubt such conduct might require a reversal. In the present case, however, we feel assured that it did not result in a miscarriage of justice. It is fair to assume that the admonition of the court cured the error when first committed. In repeating it later on the record fails to show objection or a call upon the court to compel a withdrawal of the improper remarks.

7. People's instruction numbered 3 is called to our attention as having been "disapproved by our appellate courts and should not be given." It was upon the question of the credibility of witnesses. Appellant does not point out his ground of objection nor does he cite any case where such an instruc-

tion has been disapproved. In some cases the phraseology used may have required disapproval. We find no error in the form here adopted and given to the jury.

8. People's instruction numbered 6 was as follows: "You are further instructed, that evidence of subsequent acts of sexual intercourse between the defendant and the prosecutrix, and of improper familiarity on the part of the defendant toward and with the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence solely to prove the disposition of the defendant herein toward Gertrude Genant and as having a tendency to render it more probable that the act of sexual intercourse charged in the information (indictment) was committed by the defendant on the person of said Gertrude Genant, and is to be considered by the jury for that purpose only and for no other." The objection urged is that this is a charge "upon pure questions of fact"; that all such acts were denied "and the court had no right to assume the facts." This instruction is a correct statement of the law governing the admissibility of the kind of evidence referred to and, no doubt, was intended to explain the limited purpose for which it is admissible, and we think the jury must have received it in that light alone. It would have been more in keeping with the strict rule forbidding the court from assuming the existence of facts which are controverted, had it declared the rule in the abstract. The instruction, as framed, was liable to be understood by the jury not only as indicating the purpose of the evidence of subsequent acts but that the evidence in fact had a tendency to make probable the commission of the act charged. Conceding error, we do not think there was such prejudice as to justify a reversal of the judgment. (Section 4½ of article VI of the constitution.)

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on October 22, 1914.

[Civ. No. 1288. Third Appellate District.—August 26, 1914.]

C. F. KAISER, Petitioner, v. JOHN HANCOCK, Judge of the Superior Court of Calaveras County, Respondent.

MANDAMUS—APPLICATION FOR ALTERNATIVE WRIT TO STAY EXECUTION—

NECESSITY OF NOTICE TO PARTIES INTERESTED.—One who applies for an alternative writ of mandate to require a judge of the superior court to stay execution on a judgment must, under paragraph 4 of rule XXVI of the supreme court, furnish evidence that notice has been given to all parties interested that such application will be made, in order that they may have an opportunity to oppose the issuance of the writ.

ID.—UNLAWFUL DETAINER—STAY OF PROCEEDINGS PENDING APPEAL.

There can be no stay of proceedings upon an appeal from a judgment of restitution in an action of unlawful detainer, unless the trial judge so directs, and in such case *mandamus* does not lie to compel him to order a stay, in the absence of an abuse of discretion on his part in refusing to make such order.

ID.—DISCRETION OF TRIAL COURT—ABUSE OF MUST CLEARLY APPEAR.

Abuse of discretion by a trial judge will not be presumed, but must be made clearly to appear before his discretion will be interfered with on appeal.

APPLICATION for a Writ of Mandate to be directed against the Judge of the Superior Court of Calaveras County.

The facts are stated in the opinion of the court.

A. H. Carpenter, Walter T. Lynch, and Ben Berry, for Petitioner.

J. Snyder, for Respondent.

CHIPMAN, P. J.—Petitioner seeks the writ of mandate directing respondent to make an order staying execution on a judgment against petitioner in a certain action wherein petitioner is defendant and Henry T. Higginbotham, as administrator of the estate of Mary G. Davis, deceased, is plaintiff.

It appears from the petition that the property involved is known as the Valley Springs Hotel and its equipment, situated in the town of Valley Springs, Calaveras County, belonging to the estate of said Mary G. Davis, deceased; that, in the

said action of said administrator against said Kaiser, it was alleged that defendant therein was, on and prior to April 10, 1914, in possession of said property as tenant at will of said administrator; that, on said April 10, 1914, plaintiff, said administrator, terminated said tenancy by giving written notice to said defendant, to remove from said premises and deliver said property to plaintiff within the period of thirty days specified in said notice, said notice having been duly served as prescribed in section 1162 of the Code of Civil Procedure; that all right of tenancy or claim of occupancy was thereby terminated on May 10, 1914; that said defendant did not, within said thirty days, or at any other time, surrender said property or any part thereof to plaintiff, but remained in possession thereof at the expiration of said thirty days and ever since said time; that, on May 11, 1910, plaintiff caused notice to be served upon defendant to deliver up possession of said property to him, said administrator, within three days from the service of said notice; that more than thirty days have expired since service of said first notice terminating said tenancy and that more than three days have elapsed since said last referred to notice was served; that defendant had refused to deliver said property or any part thereof and unlawfully retains possession thereof; that, while defendant was in possession of said property as such tenant at will, the amount of rent paid by defendant for the use of said property was fifty dollars per month agreeably to the understanding between plaintiff and defendant, and, by reason of the foregoing facts, plaintiff has sustained damages in the value of said rent, from May 10, 1914, to the commencement of this action; that plaintiff prayed judgment for the restitution and possession of the premises and for the amount of rental and such sum as may accrue from the filing of the complaint to date of judgment and that said rental may be trebled and that it be declared that said tenancy has ceased and that writ of possession forthwith issue.

It further appears by the petition that, on June 11, 1914, defendant served and filed his answer and cross-complaint in said cause, and, issue being joined, said cause came on for trial before a jury, on July 12, 1914, and the jury returned a verdict in favor of plaintiff; that, on July 20, 1914, judgment for plaintiff was duly made and entered and that, on July 29, 1914, defendant duly appealed to the district court of

appeal from said judgment, under the alternative method; that, on July 30, 1914, defendant "moved John Hancock, as such judge of said superior court for an order staying execution upon said judgment pending the final determination of said appeal and at the same time offered a sufficient stay-bond therefor," but the said judge refused to make such order. The petition was filed in this court August 13, 1914.

In the return respondent "admits that application was made to him on the thirtieth day of July, 1914, to fix the amount of a stay-bond on appeal, and to order proceedings upon said judgment staid during appeal; and denies that it was his plain or other duty to make such order, or that since, or at any time, has been his duty to make such order"; alleges that said action is one in unlawful detainer and is prosecuted under the provisions of chapter IV, part III of title III of the Code of Civil Procedure, designated as summary proceedings for obtaining possession of real property; that section 1176 of said code provides: "An appeal taken by the defendant shall not stay proceedings upon the judgment unless the judge or justice before whom the same was rendered so directs," and that the judge before whom said judgment was rendered refused to direct that proceedings upon said judgment be staid and has never at any time directed that such proceedings be staid "and that respondent acted legally and rightfully in refusing to stay proceedings upon said judgment."

It further appears by the return and is not denied: That no copy of notice of appeal has been served upon plaintiff in said action; that no notice of intention to move for a new trial has ever been served or filed "and no proceedings whatever have been taken by or on behalf of petitioner for a new trial of said action" or for the settlement of a bill of exceptions in said action or toward proposing a bill of exceptions or statement of any kind and petitioner has taken no steps toward having the testimony taken at the trial of said action written up; that petitioner states in his petition that said appeal has been taken under the alternative method but respondent says that petitioner has never filed with the clerk a notice stating that he desires or intends to appeal, or has appealed, and requesting that a transcript of the testimony offered or taken in the same, the rulings instructions, acts, or statements of the court, and objections and exceptions of coun-

sel, be made up or prepared, or any notice containing any of said statements; that "he has not filed or given the notice required by section 953a of the Code of Civil Procedure, or taken any proceedings in said court under the provisions of said section; that he has filed no other notice in said matter, other than the so-called notice of appeal which is hereto attached and marked Exhibit L"; that no stipulation has ever been entered into and no order of any kind made, extending the time for proposing, filing or settling a bill of exceptions or statement, or giving or filing said notice required by section 953a of the said code and "respondent alleges that the time for taking any such proceedings has long since elapsed; and that if said (appeal) has any virtue it is only as an appeal from the judgment on the judgment-roll and respondent avers that there is no reasonable or probable cause for said appeal." The return then sets out copies of all the papers constituting the judgment-roll in said action, certified by the clerk of the court, and also the certificate of the clerk "relating to the manner in which said appeal was attempted to be taken and of other facts in this answer." Respondent avers that "he rightfully and justly exercised the authority reposed in him by the statute in refusing to order proceedings on said judgment staid (stayed) during appeal," and he suggests that if it was within his discretion, it was an appropriate exercise of that discretion to refuse to grant such writ. "Respondent further avers that he had no notice of any kind of the application or petition herein until served with the alternative writ herein."

Before going into the merits of the application we wish to call attention to paragraph 4, rule XXVI: "When an application is made for an alternative writ, an order staying the proceedings of any court or officer, until the return of the writ, will not be made unless due notice of the application for the writ shall have been given to all the parties interested in the proceedings."

Respondent, in his return, states that he had no notice of the application for the alternative writ. Attention of petitioner's attorney, Mr. Lynch, was called to this rule when the alternative writ was applied for and while there was no evidence of any notice having been given the judge or the attorneys in the pending action, we were assured that verbal notice was in fact given of an intention to apply for the writ

and that the parties expressed willingness that it should be made. We have no reason to doubt the good faith of Mr. Lynch in the matter. The incident furnishes occasion for calling attention to the rule and for our saying that in the future it will be strictly adhered to. Parties applying for alternative writs in which an order is requested staying the proceedings of any court or officer until the return of the writ, must furnish evidence that notice has been given to all parties interested that such application will be made, in order that such parties may have an opportunity to oppose the issuing of the alternative writ to be applied for. The wisdom and justice of the rule are obvious, for often the lack of merit in the application may be disclosed at the hearing of the application, and injury which might ensue by the issuing of a restraining order be thus averted.

Section 1176 of the Code of Civil Procedure has been under review in several cases before the supreme court, among them the following: *McDonald v. Hanlon*, 71 Cal. 535, [12 Pac. 515]; *Gross v. Kelleher*, 73 Cal. 639, [15 Pac. 362]; *Cluness v. Reese*, 135 Cal. 660, [67 Pac. 1048]; *Bateman v. Superior Court*, 139 Cal. 140, [72 Pac. 922]; *Sarthou v. Reese*, 151 Cal. 96, [90 Pac. 187], and also in *Plummer v. Agoure*, 20 Cal. App. 319, [128 Pac. 1014]. Some of these cases were applications for *supersedeas*. But *supersedeas* is merely an ancillary process designed to supersede the enforcement of the judgment of the court below, and the writ of mandate here sought is to accomplish the same result.

It was held, in *Plummer v. Agoure*, 20 Cal. App. 319, [128 Pac. 1014]: "While the action of the trial judge in refusing to direct a stay of proceedings is subject to review on appeal, and such order will be reversed for an abuse of discretion in making the ruling, it cannot be reviewed upon an application for a writ of *supersedeas*." A petition for rehearing of that case was denied by the supreme court. In *Sarthou v. Reese*, 151 Cal. 96, [90 Pac. 187], the action was unlawful detainer; defendant, in addition to denials of the matters alleged in the complaint, filed a cross-bill claiming affirmative relief, as did the defendant in the action here. The decision in the case cited and in the case here was against the defendant upon all the issues including those in the cross-complaint and judgment was entered for immediate restitution of the demised premises. In the case cited, defendant appealed from the

judgment, as defendant has here, and the judge of the superior court before whom the action was tried refused to fix the amount of an undertaking to stay proceedings pending appeal. In the case cited, defendant petitioned the supreme court for a *supersedeas*. Said the court, by Chief Justice Beatty: "There can be no stay of proceedings upon an appeal from a judgment of restitution in an action of unlawful detainer unless the trial judge so directs," citing section 1176 of the Code of Civil Procedure; *Cluness v. Bowen*, 135 Cal. 660, [67 Pac. 1048]. In *Cluness v. Bowen*, the court said: "In the absence of a direction from the trial judge, this court has no power to order a *supersedeas* in such a case as this."

If, however, as petitioner contends, the discretion given the trial judge may be controlled by mandate when abused, we fail to discover anything in the record before us showing an abuse of such discretion. It was conceded at the argument that the appeal now pending is on the judgment-roll, the constituent papers of which are made part of the return. Every issue presented by defendant's answer and cross-complaint has been resolved against him and the facts set out in plaintiff's complaint found to be true by the general verdict of the jury crystallized in the judgment of the court. There were no special circumstances of hardship to defendant shown to the trial judge calling for the exercise of his discretion in defendant's favor, so far as we know, when a stay of execution was applied for and none is presented here. Abuse of discretion by a judge will not be presumed; it must be made clearly to appear before his discretion will be interfered with. Viewed, then, either as a power exclusively given the trial judge, or as a power merely within his discretion, we fail to discover error in the order complained of.

The writ is denied and the restraining order heretofore issued is dissolved.

Hart, J., and Burnett, J., concurred.

[Crim. No. 255. Third Appellate District.—August 29, 1914.]

THE PEOPLE, Respondent, v. K. OSAKI, Appellant.

CRIMINAL LAW—ROBBERY—SUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION.—In this prosecution for robbery the testimony of the prosecuting witness, if believed by the jury, warranted their return of a verdict of guilty, and the appellate court cannot say that credit should not have been given such testimony and hence it is bound thereby.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order refusing a new trial. J. A. Plummer, Judge.

The facts are stated in the opinion of the court.

Webster, Webster & Blewett, and R. L. Beardslee, for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

BURNETT, J.—The appeal is from the judgment of conviction of the crime of robbery and from the order denying defendant's motion for a new trial.

It is admitted by appellant that the record is unusually free from error and only two points are made by him, both of which we deem devoid of substantial merit.

As to the sufficiency of the evidence we need do no more than to call attention to the testimony of Frank Brooks, the prosecuting witness, in connection with a few admitted facts: Defendant and his codefendant, M. Osaki, conducted a small restaurant in the city of Stockton. On December 27, 1913, Brooks went into said restaurant, between 8 and 9 o'clock, to get something to drink—"some ginger and hot water—maybe a little whiskey." As he started to go the defendant caught him by the coat in the door and "he says 'you can't go out until you pay for it'; I says 'I am just going to step to the door here, coming right back,' so I went back and paid it, then went out and got my drink and came back and my coffee I thought was not quite hot enough for me"; then, after a dispute as to whether a nickel was due from Brooks,

he laid it on the counter and said: "There is your nickel" and started to go out when appellant's codefendant threw a sugar bowl at Brooks, and, obviously, referring to appellant himself, the witness proceeded: "and that one there, whatever his name is, came running around the counter and jumped onto me on this side and both of them bent me over this way and went through my pockets; one of them went in here and tore a button off my vest here, went in my shirt pocket there and got a roll of bills," and furthermore, "they took three dollars in silver out of my pants pocket there, my knife out of this one and I had a key and a small silver watch chain out of the hip pocket here." The jury undoubtedly believed the witness and the only conclusion, therefore, possible was a verdict of guilty. We cannot say that credit should not have been given to the testimony and we are therefore bound by it.

The other point is worthy of no more extended consideration. It relates to an objection to the following question asked of Brooks: "After you came in from getting your drink of ginger, what if anything was done with regard to this pack of bills by you?" The point of the objection was that it was not shown that the defendant was present at the time. As to this, while the witness at that particular moment did not see defendant the latter was undoubtedly near and it was for the jury to say whether he saw what was done with the bills. Aside from that, it was a material circumstance in the case tending to show that the witness had the bills on his person; and it may be said, also, that if the evidence was erroneously admitted it could not possibly have affected the result in view of the statements of the witness as to the actual commission of the robbery.

There is no reason for interfering with the verdict, and the judgment and the order denying the motion for a new trial are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1530. Second Appellate District.—September 1, 1914.]

GRANT LINCOLN, Respondent, v. D. W. SIBECK, Appellant.

NEW TRIAL—SETTLEMENT OF STATEMENT BY JUDGE WHO DID NOT TRY CASE—DISMISSAL OF APPEAL.—An appeal from an order refusing a new trial will not be dismissed because the statement on the motion for the new trial was not signed by the judge before whom the cause was tried, notwithstanding he was not shown to have been without the state, or otherwise conditioned as is specified in the cases mentioned in section 653 of the Code of Civil Procedure.

ID.—IRREGULARITY IN SETTLING STATEMENT—CONSIDERATION ON MOTION TO DISMISS APPEAL.—The matter of the irregularity of proceedings occurring prior to the making of an order refusing a new trial, cannot be considered on a motion to dismiss the appeal from such order, although the same may constitute sufficient cause for affirming or reversing the order.

MOTION to dismiss appeals from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. L. T. Price, Judge presiding.

The facts are stated in the opinion of the court.

James R. Choate, E. O. Leake, and Edgar F. Hughes, for Appellant.

Robert T. Linney, and Ralph W. Schoonover, for Respondent.

THE COURT.—Motion to dismiss appeals from a judgment and from an order denying a motion for a new trial. The grounds of motion are: That the appeals were not taken within the time limited by law; that the statement on motion for a new trial was not settled and allowed as required by law. The motion, in so far as it concerns the appeal taken from the judgment, is not pressed, and it appears that this appeal was regularly taken. The chief complaint as to the statement on motion for a new trial not having been regularly settled, rests upon the fact that the superior judge of Alpine County, who heard the cause at the trial, did not settle the statement, notwithstanding that he was not shown to have been without the state, or otherwise conditioned as is specified in the cases men-

tioned in section 653 of the Code of Civil Procedure. It is not contended as a ground for dismissal that the judge who passed upon the motion for a new trial was without jurisdiction so to do. It has been held that the matter of the irregularity of proceedings occurring prior to the making of an order such as that here appealed from cannot be considered on a motion to dismiss, although the same may constitute sufficient cause for affirming or reversing the order. (*In re Ryer*, 110 Cal. 559, [42 Pac. 1082]; *Fish v. Benson*, 71 Cal. 428, [12 Pac. 454].) Upon the authority of these decisions the motion to dismiss the appeal from the order denying the motion for a new trial is denied. For the reason first stated the motion as directed to the appeal from the judgment should also be denied, and it is so ordered.

[Crim. No. 840. Second Appellate District.—September 1, 1914.]

THE PEOPLE, Respondent, v. ROBERT GILMORE,
Appellant.

CRIMINAL LAW—ATTEMPT TO COMMIT LARCENY—SUBSTITUTION OF BOGUS RING FOR GENUINE ONE IN SHOW CASE.—Where one enters a jewelry store, asks to be shown a tray of diamond rings, and while looking at them attempts to substitute a bogus ring in place of a good one in the tray, but, being detected, abandons his purpose and seeks safety in flight, he may be convicted of grand larceny.

APPEAL from a Judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Frank R. Willis, Judge.

The facts are stated in the opinion of the court.

Frank A. McDonald, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

SHAW, J.—Defendant was charged with the crime of grand larceny, and upon trial was convicted of an attempt to commit the offense with which he was charged.

He appeals from the judgment and an order of court denying his motion for a new trial.

The only ground upon which a reversal is asked is that the evidence is insufficient to sustain the verdict.

A brief statement of the case shows appellant's contention to be wholly without merit. No evidence was offered on behalf of defendant. That offered on behalf of the people shows that during the noon hour on December 18, 1913, defendant, with a companion named Isenberg, entered the jewelry store of O. L. Wuerker, in Los Angeles, stating to Mr. Willard, manager of the store, that they desired to look at some diamond rings. Mr. Willard then took from the show-case a tray of diamond rings and exhibited them to defendant and Isenberg, who, after looking them over, indicated that none of them was satisfactory, defendant suggesting that they be shown a tray of rings which was in the show-window. Mr. Willard replaced the tray of rings taken from the show-case and brought out the tray from the window. From this tray Isenberg selected a ring priced at ninety dollars, saying he would make a deposit of two dollars upon it. Defendant meanwhile was looking at a ring from the tray priced at two hundred and eighty-five dollars. As Willard reached for an envelope wherein to place the ninety dollar ring selected by Isenberg, and while defendant was looking at the two hundred and eighty-five dollar ring, he (Willard) saw in the tray containing the rings an imitation diamond ring in size similar to the two hundred and eighty-five dollar ring, the latter not being in the tray. Willard picked up the tray and, as he returned it to the show-case, took therefrom the bogus diamond and said: "I don't want this ring; come on, give me the good ring, and do it quick. You can't do that to me here. . . . I don't want your \$2. . . . I shoved the \$2 back to him and I took the \$90 ring. He says, 'What do you mean by that?' I says, 'I mean you got to pay for that ring or give it to me quick.' As I said that, why Mr. Gilmore starts and turned around and run, and Mr. Isenberg. So I went out after them just as hard as I could go." At the door defendant and Isenberg separated, one going north and one south. Willard followed Isenberg, and a gentleman who was entering the store followed defendant, who ran north to Second and Spring streets, thence to Broadway, thence south to the middle of the block, where he was caught and turned over to an officer. Willard further

testified that in place of the good ring, defendant placed in the tray a bogus ring of the same size. Both defendant and Isenberg were taken back to the store by officers, and upon being searched the imitation ring was taken from Gilmore's pocket, and later two other imitation diamond rings were found under the show-case near where Isenberg and defendant had been standing. When Willard ran out of the store to intercept defendant and Isenberg, another employee of the store, whose attention was attracted by the trouble, went to that part of the store where Willard had been exhibiting the rings and, reaching for the pad used in exhibiting diamonds, discovered the ring which is alleged to be the subject of the larceny. He stated that owing to the fact that a customer was standing against the show-case where this pad was, he was unable to say whether the ring was on top of the pad or underneath it. From this statement of facts disclosed by the evidence, and other circumstances indicative of guilt, it is impossible to perceive how the jury could have reached any other conclusion than that an attempt, as defined in section 664 of the Penal Code, and *People v. Mann*, 113 Cal. 79, [45 Pac. 182], was made to steal the ring. Defendant's failure to accomplish his intended purpose was clearly due to Willard's discovery of the bogus diamond placed in the tray as a substitute for the genuine one which defendant at the time had in his possession. Having been detected in the act, he abandoned his unlawful purpose and sought safety by fleeing.

The judgment and order are affirmed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 338. Second Appellate District.—September 2, 1914.]

THE PEOPLE, Respondent, v. ALONZO ISENBERG,
Appellant.

CRIMINAL LAW—ATTEMPT TO COMMIT LARCENY—SUBSTITUTION OF BOGUS FOR GENUINE RING.—Where two men enter a jewelry store, ask to be shown some diamond rings, and while a sale is being negotiated the salesman discovers an imitation diamond ring has been put in the tray in place of a genuine one, and upon his demand that the ring be returned the would be purchasers run away, and afterward the good ring is found upon or under the rubber mat on the show case

and a bogus ring is found on each of their persons, the evidence is sufficient to support a conviction of an attempt to commit larceny.

IN—CONFESSION—ADMISSIBILITY WHEN MADE TO POLICE OFFICER.—If one of the men, after his arrest, makes a statement as to the commission of the offense to police officers in response to their interrogations, there being no coercion, improper importunities, or inducements, the confession is admissible against him.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Frank R. Willis, Judge.

The facts are stated in the opinion of the court.

Frank A. McDonald, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

JAMES, J.—Defendant was charged jointly with one Robert Gilmore with having committed the crime of grand larceny, the property alleged to have been stolen being a diamond ring of the alleged value of two hundred dollars. The defendants demanded and were accorded separate trials. The jury in the case of appellant returned a verdict finding the defendant guilty of an attempt to commit the crime of grand larceny. From the judgment as entered upon that verdict, and from an order denying a motion for a new trial, this appeal was taken.

The testimony as given at the trial presented in the main an undisputed statement as to the facts of the occurrence at which it was contended appellant participated in the theft of a diamond ring. Appellant and Gilmore together, in the day time, entered a jewelry store in the city of Los Angeles and after some preliminary talk asked to be shown diamond rings. The salesman took out a tray and exhibited the rings to them and one of the two men proposed that he make a two dollar deposit on a ninety dollar ring. While this negotiation was going on the salesman discovered that an imitation diamond ring had been placed in the tray instead of the ring containing a genuine stone, and immediately demanded that his ring be returned. Upon this the appellant and Gilmore started out of the store and the salesman pursued them. Upon reaching the sidewalk Gilmore went in one direction and Isenberg in

another, each traveling very swiftly. They were pursued and captured and when brought back to the store an imitation diamond ring was found in the pocket of Gilmore, and later at the police station another ring of the same kind was found in the pocket of appellant. The ring which it was charged that the men had stolen was found either upon or under a small rubber mat lying on the show-case where it seems to have been placed or dropped by appellant or his companion at the time they left the store. After his arrest appellant was interrogated by the police officers and finally made a statement in which, it was testified, he told a complete story of how he and Gilmore had purchased the imitation diamond rings for a few cents with the purpose of perpetrating the swindle which they attempted. Appellant denied that he had made this statement, when he testified at the trial, but all the other facts adverted to remain proven beyond dispute and without contradiction. Upon this state of the record it is contended that the evidence was insufficient to justify the conviction of appellant, and further that the court improperly allowed proof to be made of the alleged confession. The evidence was abundantly sufficient to justify the verdict of guilty; indeed it would be hard to conceive how any jury of reasonable men could have reached any other determination upon the case. It is a matter for further remark that appellant appears to have been quite leniently dealt with, inasmuch as the evidence tended most strongly to show that not only was there an attempt to commit the crime of grand larceny, but that the crime charged had been completely consummated. The ruling of the court permitting evidence to be offered showing the alleged confession was without error. No such a case is presented as that considered in *People v. Quan Gim Gow*, 23 Cal. App. 507, [138 Pac. 918], decided in this court and which is cited by appellant. Here it was made to appear by satisfactory evidence that appellant was not coerced by the use of any improper importunities or inducements to make the statement of which evidence was given at the trial. There are no other alleged errors urged in the briefs of counsel for appellant which require consideration. The record shows that appellant was accorded a fair trial and that his conviction was based upon evidence of clear and convincing character.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, concurred.

[Crim. No. 250. Third Appellate District.—September 2, 1914.]

THE PEOPLE, Respondent, v. H. N. PERRY, Appellant.

CRIMINAL LAW—JURORS—VOIR DIRE EXAMINATION—DISALLOWANCE OF QUESTIONS—HARMLESS ERROR.—In a prosecution for selling intoxicating liquors in no-license territory error, if any, in disallowing questions to a juror on his *voir dire* examination is without prejudice to the defendant, if he exhausts but seven of the peremptory challenges to which he is entitled and the juror is accepted and constitutes one of the panel that tries the case.

ID.—INTOXICATING LIQUORS—SALE IN NO-LICENSE TERRITORY—EVIDENCE OF OTHER SALES.—In such prosecution error, if any, in admitting testimony of prior sales of liquor by the defendant, is cured if the court orders the evidence to be stricken out and instructs the jury to wholly disregard it, and other evidence produced by the people justifies the verdict of guilty.

ID.—INFORMATION—ERROR IN ALLEGING PLACE OF SALE—AMENDMENT.—If the information in such case charges that the offense was committed in no-license territory but mentions the wrong township, it is not error to permit the district attorney to amend the information in this respect at the trial.

ID.—PLACE OF SALE OF LIQUOR—NECESSITY OF PARTICULARLY DESCRIBING IN INFORMATION.—It is the better practice, where infractions of the Local Option Law are charged, to describe the unit within which they have occurred by name or number, as the case may be, so as to particularly identify it, but where the information, merely following the language of the act, charges that the illicit sale was made in "no-license territory," that should be a sufficient statement of the offense to inform the defendant of the particular offense against which he is thus required to defend.

APPEAL from a judgment of the Superior Court of Butte County. H. D. Gregory, Judge.

The facts are stated in the opinion of the court.

W. K. Hays, for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

HART, J.—Convicted of the crime of selling intoxicating liquor in the fifth supervisory district of Butte County, said district having been at a date prior to that of the commission

of the alleged crime made by the electors thereof no-license territory under the Local Option Law, the defendant brings this appeal to this court from the judgment, claiming to be entitled to a reversal thereof on the grounds: 1. That the court erred in its rulings disallowing answers to certain questions propounded by counsel for the defendant to certain jurors on their *voir dire* examination; 2. That the court erred in allowing testimony of sales of intoxicating liquor by the defendant, other than that alleged in the information; and, 3. That error was committed by permitting the district attorney to amend the information in a certain respect, to be hereafter more particularly explained.

1. It is wholly unnecessary to reproduce here the questions to which answers by the jurors were interdicted under the rulings of the court, as it is clear that the action of the court in that regard was without prejudice, even if it may well be conceded that to some of said questions answers could have with legal propriety been allowed. The only record here upon this point applies solely to the case of juror George A. Martin. It shows that the defendant exhausted but seven of the peremptory challenges to which he was entitled (Pen. Code, sec. 1070), and it further shows, at least presumptively, that juror Martin was satisfactory to the defendant, as he was accepted and constituted one of the panel which tried the cause. (*People v. Shafer*, 161 Cal. 573, 576, [119 Pac. 920, 921]; *Scragg v. Sallee*, 24 Cal. App. 133, [140 Pac. 706].)

2. The charge in the information is that the defendant did, on the twenty-fifth day of September, 1913, "sell intoxicating liquor, to wit, whiskey, a spiritous liquor, to H. A. Breedlove, in no-license territory, to wit: In Kimshew township, county of Butte," etc. The court, over objection by the defendant, permitted the district attorney to prove by other witnesses than Breedlove that they had, at various times prior to the date of the commission of the offense stated in the information, purchased intoxicating liquor from the defendant. Thereafter, the attorney for the defendant moved to strike out that testimony. The court granted the motion and instructed the jury to entirely disregard it in considering the question of the guilt or innocence of the defendant.

We are not prepared, nor is it necessary, to pass upon the question whether this is of that class of cases of which the case of the *People v. Whalen*, 154 Cal. 476, [38 Pac. 194], is

an example, and in which proof of other similar acts by the defendant is admissible for the purpose of showing that the specific act charged was not the result of mere accident or a mere adventitious circumstance but that it was done deliberately and with the intent to violate the law; for we think that, inasmuch as the testimony produced by the people in support of the charge well justified the verdict, the action of the court in striking from the record the testimony referred to and in instructing the jury to wholly disregard it in their consideration of the case, cured the error, if error it was, in admitting it. The jury are to be presumed to have heeded and obeyed that as well as the other instructions of the court.

3. The information, in its original draft, alleged that the defendant sold the liquor named therein "in no-license territory, to wit: In Kimeshew township, county of Butte, state of California, said Kimshew township being situate in the third supervisorial district of said county." Before the prosecution had finished its case in chief and, therefore, before the defendant had opened his defense, the evidence introduced by the people disclosed that Kimshew township is situated in the fifth instead of the third supervisorial district of said county, as alleged, and upon this fact being thus developed, the district attorney moved the court for permission to amend the information in that regard, and the motion was granted.

It would no doubt be the better practice, where infractions of the Local Option Law are charged, to describe the unit within which they have occurred by name or number, as the case may be, so as to particularly identify it, but we think that where the information, merely following the language of the act, charges that the illicit sale was made in "no-license territory," that ought to be a sufficient statement of the offense to inform the defendant of the particular offense against which he is thus required to defend.

The general rule in criminal pleading is that the charge sought to be laid therein is sufficiently set forth if it be alleged in the language of the statute defining the crime. There are, of course, some qualifications or exceptions to that rule. Still, in this case, we can conceive of no sound reason why the general rule above stated would not be applicable. If, for example, an information should state that the illicit sale of intoxicants had taken place "in the town of A, which said town is situated within no-license territory," it would seem

that such statement of the offense would not only be substantially in the language of the statute, but sufficient to apprise the defendant of all that it would be essential for him to be informed of in order to enable him to prepare himself to defend against the charge, viz.: the fact of the sale and the fact that such sale took place within the boundary lines of a dry unit.

We conclude, therefore, that, in this case, the information, having declared that the act charged was committed in "no-license territory" and then designated by name the particular township of said territory where said act took place, was sufficient in all respects to inform the defendant of the particular offense for which he was to be put upon his trial, which is all that is required in any criminal pleading, and that, therefore, the mere matter of the description of the "no-license" territory may be treated as surplusage. The question, then, so far as the character of the alleged "no-license territory" is concerned—that is, whether it is or is not in point of fact a dry unit—resolves itself into one of proof, the burden of which rests, of course, upon the people.

In principle, the proposition thus declared is cogently analogous to that stated in the case of *Ex parte Anixter*, 166 Cal. 762, 765, [138 Pac. 353], where, first declaring that neither the soliciting of orders nor the making of agreements within no-license territory for the sale of intoxicants to be delivered outside such territory was an act falling within the inhibitions of the Local Option Law, the court held that the fact that the liquors to which such solicitations or agreements related were to be delivered within a dry unit need not be alleged in the complaint or the information, inasmuch as it would be incumbent upon the people to prove that fact and that their failure to do so would completely exonerate the defendant.

But, in any event, it cannot be perceived how the substantial rights of the defendant could have been prejudiced by the amendment of the information as shown.

Amendments of criminal pleadings, to a certain extent, are authorized by section 1008 of the Penal Code, as amended by the legislature of 1911 (Stats. 1911, p. 436), which, in part, provides: "An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any

time thereafter, in the discretion of the court, where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

As shown, the information charges that the act of selling the intoxicants was committed "in no-license territory, to wit: Kimsheew township, county of Butte," etc. These allegations were, of course, essential to the statement of the offense. Now, then, if it be proper or necessary for the information to specifically describe by name or otherwise the particular "no-license territory," can it be said that for that reason such description becomes an essential constituent of the crime? Clearly not. While it might be important to specifically designate or describe the particular dry unit within which the act of selling was committed, it cannot, manifestly, be said that such designation or description is any part or element of the crime or is essential to the statement of the gist or gravamen of the charge, which is, obviously, the act of selling within the limits of no-license territory.

Clearly, the mere making of a correction in the description or in the name of the no-license territory cannot have the effect of charging an offense different from that originally charged, or of inserting in the information any new or additional allegations of fact requiring the defendant to prepare for any further or different defense against the charge than that required of him before such amendment or correction was made.

The defendant at the trial had the full benefit of his plea of not guilty to the information and as ample opportunity to meet the charge after the amendment as he could have had prior thereto. His substantial rights could not have been affected or impaired in the slightest measure by an amendment of the information which could not and did not change the nature of the charge against him.

We have discovered no substantial reason calling for a reversal of the judgment and it is, therefore, affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 247. Third Appellate District.—September 2, 1914.]

THE PEOPLE, Respondent, v. F. H. HAIL, Appellant.

CRIMINAL LAW—HOMICIDE—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.—In this prosecution for homicide, although the evidence is technically sufficient to uphold the conviction of manslaughter, there exists grave doubt of the guilt of the accused of any crime.

ID.—ARGUMENT OF DISTRICT ATTORNEY—WHEN IMPROPER AND GROUND FOR REVERSAL.—Where there is a manifest paucity of evidence tending to establish the guilt of the accused, as is here the case, it is reversible error for the district attorney to state in his argument that the jurors, if they acquit the defendant, will be afraid to go upon the streets and meet their fellow-men.

ID.—DUTY OF DISTRICT ATTORNEY—MAJESTY OF LAW—KEEPING WITHIN RECORD.—A public prosecutor represents all the people, of whom every person accused of violating public law is none the less one because he is so accused. He represents the majesty of the law, which stands for the protection of every citizen against the taking of his life, his liberty, or his property without its due process—the law which condemns rather than commands the conviction of a person of a public offense upon insufficient evidence or by unfair means. That official should always do his sworn duty, of course, but he should always do it fairly and justly and not permit the great power with which he is clothed to be converted into an instrument of persecution. He should, as indeed any lawyer should, in his address to a jury, remain strictly within the record, and not attempt to evolve any theory or to import into the case any features not fairly and reasonably justified by the proofs.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—REVIEW ON APPEAL.—Alleged misconduct of a district attorney may be reviewed on an appeal from the judgment, notwithstanding the absence of any ruling of the trial court in reference thereto, if objection is made by the defendant and the trial court refuses to take any heed thereof, and exception is reserved and presented by a proper record on appeal.

APPEAL from a judgment of the Superior Court of Plumas County and from an order refusing a new trial. J. O. Moncur, Judge.

The facts are stated in the opinion of the court.

L. N. Peter, Jas. M. Hanley, and W. W. Kellogg, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

THE COURT.—The defendant, having been convicted of the crime of manslaughter under an information filed in the superior court of Plumas County, charging him with the crime of murder, alleged to have been committed at Quincy, in said county, on the sixteenth day of August, 1913, prosecutes these appeals from the judgment and the order denying him a new trial.

The assignments of error are numerous and may be stated in orderly sequence as follows: 1. That the evidence does not support the verdict; 2. That the court erred in certain rulings whereby certain evidence was admitted and certain evidence excluded; 3. That the district attorney, during the trial of the cause and in his argument to the jury, was guilty of misconduct seriously prejudicing the substantial rights of the accused; 4. That, in its charge, the court misdirected the jury in matters of law; and, 5. Newly discovered evidence, etc., etc.

In view of the conclusion we have reached that the judgment must be set aside on the ground of substantial prejudice suffered by the defendant by reason of certain remarks by the district attorney in his argument to the jury, it will be unnecessary to notice the other assignments. A consideration of the point which we conceive demands a reversal of the judgment and the order will, however, necessitate a somewhat extended review of the evidence.

The voluminousness of the evidence adduced at the trial, and which, in its entirety, constitutes a part of the record on these appeals, may at once be apprehended when it is stated that forty-five witnesses were called, gave testimony and most of them subjected to exhaustive cross-examination. It would, therefore, be impossible, in the examination of the evidence, to consider and review in this opinion in full detail the testimony of each of the witnesses. Indeed, since there appears to be, upon the face of the testimony, little or no material conflict therein, with perhaps an exception or two upon certain points, to which it will be our duty to direct attention, it is deemed necessary only to present here an accurate synoptical statement of the facts which logically follow from the evidence, now and then, as in our judgment the necessity of this decision may require, briefly quoting certain testimony.

The defendant, at the time of the homicide, was sixty-two years of age and a journalist by profession, having been, up to the time of the unfortunate affair of which this case is the

outgrowth, continuously engaged, for a period exceeding thirty years, in the business of publishing and editing newspapers in Plumas County.

The deceased, John H. Boyle, was a lawyer by profession and was, and had been for several years prior and up to the time of his death, engaged in prosecuting the practice thereof at Quincy, the county seat of said county. He was, at the time mentioned, about thirty-five years of age, in stature measured five feet, nine inches and three-quarters and in robust health.

It appears that, approximately a year prior to the date of the homicide, the deceased had made an application to the Masonic lodge of Quincy to become a member thereof, and that, upon considering and voting upon said application, said lodge rejected it and thus denied the deceased the privilege of becoming affiliated therewith. The result of the action of said lodge upon his application was, quite naturally, a sore disappointment to Boyle, and it seems provoked in him an intense feeling of hostility and resentment against all the members of said lodge in general and in particular against the individual, whoever he might be, whose vote upon the application had resulted in its rejection. According to the undisputed evidence, he, on indiscriminate occasions, bitterly denounced the members of the lodge collectively, referring to them in language scurrilous and opprobrious in the extreme. He let it be understood in no uncertain language that he would in some manner avenge the wrong which he conceived had been committed against him by the denial to him of the privilege of entering into membership of the Masonic fraternity, if he could succeed in discovering the identity of the member of the local lodge of that order who had cast the "blackball" against his application. He appears to have started an investigation looking to the disclosure of the identity of the individual who thus had prevented his acceptance into the lodge and kept up a relentless prosecution of it until he had obtained information, sufficient to him, upon which to base the belief that the defendant was the party who had cast the vote fatal to his hope of becoming a member of the lodge. Whether he had any tangible ground upon which to found his belief or suspicion, or whether he had obtained satisfactory evidence that the defendant was the party who cast the "blackball" on his

application, it is very evident that he in good faith believed that the accused cast the vote which obstructed his admission into the lodge, for it appears that for a period of approximately nine months prior to his fatal meeting with the defendant, he repeatedly accused the latter of having been responsible for the rejection of his application and had repeatedly referred to him in the most abusive and violent language and threatened to get even, or, as some of the witnesses put it, declared that he would "get him." Shortly after he had been rejected as an applicant to membership of the lodge, the deceased met the defendant and at once entered upon a discussion of the fact of his rejection, asking the latter if he was present at the lodge meeting at which his (deceased's) petition was considered and acted upon. The defendant replied that he was at said meeting, whereupon the deceased denounced the man who "blackballed" him as a "son of a bitch," and added, in great anger and vehemence, "that he would continue to hunt the son of a bitch that blackballed him and when he found him he would get him." Later—about six weeks or two months previously to the date of the tragedy—the deceased again saw and met the defendant, this time in the corridor of the court house. Of this meeting the defendant testified: "Mr. Boyle came rapidly behind me and accosted me, leaning his elbow on the post or railing and looking straight at me, in a menacing manner, said: 'Mr. Hail, will you deny to me that you cast that blackball against me?'" To which Hail answered: "John, I will neither deny it nor affirm it, as I have already told you," and thereupon Hail hastily left the deceased and went up the stairs of the court house.

For some time prior to the day on which the fatal shooting occurred, Hail had at various times been told by different parties that the deceased had reached the conclusion that he (Hail) had cast the "blackball" against the former; that the deceased was constantly abusing the defendant in severe and scurrilous terms and that he had made threats against Hail.

We are now brought to the day of the homicide, some of the immediate circumstances of which will be the better understood by the following preliminary explanation: It appears that, during the course of the agitation over the rejection of the petition of the deceased to become a member of the Masonic lodge, an article, anonymously signed, was

published in the *News*, a newspaper published at Greenville, in Plumas County. It further appears that, subsequently to the publication of said article, a certain editorial was printed in the *National-Bulletin*, a newspaper published and edited by the defendant at Quincy. There is nothing in the record from which the character and the specific subject matter of said articles can definitely be ascertained or determined. It is, however, fairly and reasonably inferable from the whole record and the references in the testimony to said articles that the one printed in the *News* contained an acrimonious discussion of the action of the Masonic lodge in rejecting the petition of the deceased, and, perhaps, an insinuation that the defendant was responsible for said action, and a severe arraignment of him therefor, and that the article published in the *National-Bulletin* was a reply thereto and while not referring by name to the author of the article appearing in the *News* (doubtless for the reason that his identity was not certainly known to the defendant), severely (it is to be apprehended) anathematized the latter and his article. At all events, it is clearly manifest from the testimony that the *News* article was exceedingly offensive to the defendant and that the latter's article greatly offended and was resented by the deceased, he having been persuaded, at least in some measure, that the strictures contained in said last mentioned article, whatever they might have been, were aimed at him. With this explanation, we will return to the day of the tragedy.

Between half-past 7 and 8 o'clock of the evening of August 16, 1913, the defendant and one Edward Huskinson were holding a conversation near the outer edge of the sidewalk, in front of what is known as the "Capitol Saloon," located on Main Street, in Quincy, the defendant, it appears, standing on the ground or not quite upon the sidewalk, but near the curbing. They had thus been engaged for a very brief period of time ("probably a minute, maybe two," so Huskinson thought), when the deceased put in an appearance and approaching the spot where the two men were standing, and with "a little wild, a little glitter in his eye, under subdued excitement," addressed the defendant, saying: "Mr. Hail, I would like to see you a minute." Hail, thereupon, and without making a reply to the deceased, im-

mediately "turned around and hastily stepped up on the sidewalk and started up town past the barber shop. Mr. Boyle turned and followed, headed him off in front of the barber shop." Huskinson testified that, at that juncture, he "started across the sidewalk towards the Capitol (saloon). Just as I got to the swinging doors," he continued, "I thought I heard something like a slap and immediately followed by the words: 'You son of a bitch.' I turned around and saw Mr. Boyle backing down the sidewalk and Mr. Hail following him. Mr. Hail had an open pocket knife in his hand and as Mr. Boyle backed off the sidewalk, I jumped in between them. I said: 'For Christ's sake, Johnny, cut this out,' or, 'let's have none of this.' At that I looked at his hand and found there was nothing in that, but his hands were clasped, clinched; then I turned around and Mr. Hail was gone. I asked Mr. Boyle: 'What has become of Hail?' He says: 'He has gone after his gun—by G—d, I will be here when he comes back.' " Huskinson and Boyle, after the departure of Hail, stepped up on the sidewalk, and Huskinson asked Boyle what he had done. The latter replied that he had asked Hail "if he meant that article" for him, that Hail returned an affirmative answer and that he (Boyle) thereupon slapped Hail's face.

Hail's version of the first meeting between the deceased and himself is as follows: That he was on his way to the Masonic hall carrying with him a written invitation from the board of education to the Masonic lodge to conduct the ceremonies of laying the corner-stone of a new high school building in Quincy, the construction of which was then in progress; that he met Huskinson at the point above mentioned and paused to tell him of said invitation and, while so engaged, "Boyle came up and took a position on the sidewalk between Huskinson and myself. With a jerk of the head and a fierce, menacing expression on his face, said: 'Mr. Hail, I would like to speak to you a minute as soon as you are through with Mr. Huskinson.' I made no reply and started to go down the street past the Grand Central Hotel and post-office to the Masonic building. Mr. Boyle followed me, and, as I was about to step up on the sidewalk, he accosted me again and said: 'Parties tell me that article in the paper meant me.' I made no reply other than to say: 'That is up to you, John.' As quick as I got the words, 'that is

up to you, John' out of my mouth, he struck me a heavy blow on the left side of my head and ear with his right hand, accompanying the blow with the words, 'you son of a bitch.' He also called me a black bastard. I jumped up on the sidewalk, told him he was a dirty coward, and moved westward past a post and a tree or trees; I knew he was a young man, thirty-five years of age, active and powerful, and that I was an old man of sixty-two years and in a weakened condition. I, therefore, knew that I had no show with him in a physical contest. As I passed westward of the post and tree or trees, I quickly took from my pocket a small pen knife and opened it. I did this, not for the purpose of assaulting Mr. Boyle, but for the purpose of warding off and preventing him from making an attack upon my life, as he had previously threatened. . . . During the latter part of his trouble Mr. Huskinson was on the sidewalk at my right, by words and acts trying to stop the trouble. Mr. Huskinson's efforts gave me an opportunity to escape from a disgraceful street brawl, and possibly prevented another assault upon my life, and I did so."

After the departure of Hail from the scene of the assault above described, Huskinson remained for a while with Boyle and undertook to persuade him to drop the matter and to leave that part of the street. Huskinson's expostulations were unavailing, and, saying to the deceased, "Well, Johnny, if you aint going, I am—for Heaven's sakes don't have any trouble," he walked into the Capitol saloon.

With the exception of a child just past the age of eight years, Albert Vance by name, who said that he saw Boyle slap Hail a severe blow and the latter with a knife in his hand attempting to stab the former, although the two men, he said, were never close to each other after Boyle struck Hail, the only witnesses to the first altercation between the defendant and the deceased were Huskinson, Boyle, and Hail. There was no material variance between the testimony of Huskinson and that of Hail relating to the circumstances of the original actual hostile meeting of the parties, and it is hence manifest that the testimony of these witnesses detailing said circumstances stands in the record undisputed. Thus the proposition is obvious that the deceased was the original aggressor or the first to precipitate actual hostilities.

It now remains to be seen what the evidence discloses relative to the subsequent events which finally led to the fatal shooting.

As seen, the defendant left the scene of the first difficulty immediately after Huskinson stepped in and stopped the further progress of the altercation. The testimony shows and, in fact, the defendant declared it to be true on the witness stand, that, forthwith upon the cessation of the first trouble, he started for and went to his office. What he did there and of his movements thereafter up to and including the time of the shooting may best be told in his own language, inasmuch as his is the only testimony disclosed by the record bearing upon certain incidents occurring after the original difficulty and immediately connected with the final chapter of the tragedy. He testified: "I entered the office and went back to the editorial room, turning on the electric light with my hand and handkerchief and examined my head and ear to see if they were bloody. I found no blood. I then reached down into a drawer of my desk and took therefrom a pistol and put it in my right front pants pocket, for the purpose of defending myself against an assault by him should he make it again that evening in accordance with threats previously made. I left my office and resumed my journey to the Masonic lodge. I was going to the Masonic lodge for the specific purpose already referred to—that of delivering the resolution adopted by the board of education to the secretary of the lodge. Near the west line of Mr. Stone's jewelry store I observed Mrs. B. Schneider coming across the street from the Plumas House. She hailed me she said to have a talk with me. I told her I was in a hurry at that time and could not do so, but that I would be glad to do so on a future occasion. She signified her assent and I resumed my journey to the Masonic lodge. The Masonic lodge, while I think the rule is 7:30, in the summer months, it seldom meets before 8 o'clock, usually about that time. I was hurrying to get there before lodge opened and deliver this document to the secretary. Q. What course did you pursue along the street after talking to Mrs. Barney Schneider? A. I went along the sidewalk on the north side of Main Street. Q. What is your usual course and what had been your accustomed course in going to the Masonic lodge? A. To go down by the way of the *National-Bulletin* office and Main Street." (This

course would require the defendant to pass the point where the deceased made his first assault upon Hail.) "Q. After leaving Mrs. Schneider, going along Main Street, did you know whether or not John Boyle, the deceased, would be upon the street that night? A. I didn't know positively that he would be on the street, yet I was afraid that he might be." The defendant continued: "I did not expect to meet him for the reasons I have indicated, but of course I did not know but I might meet him, especially as to reach the Masonic lodge I was compelled to go near his residence which is next door. When I reached a point near the east line of the Ford and Lee Company's grocery store, I glanced ahead of me and saw Mr. Boyle partially crouched and hidden behind a post near the scene of the former trouble. Mr. Boyle had his right leg thrown back and his right hand at his hip pocket. I changed my course of travel from the center of the sidewalk to one near the walls of the building on the opposite side of the sidewalk from where Mr. Boyle stood. When I got to a point probably a couple of feet west of him he suddenly sprang from his position behind the post on to me and with some epithet struck me a heavy blow on the left side of the head with his fist. The effect of the blow was to daze me. When I found myself recovering from the condition mentioned I found Mr. Boyle clinching with me and myself endeavoring to draw my pistol. It was at that time that I heard two shots fired in rapid succession. At least it so seemed to me. I was confident Mr. Boyle had fired for the purpose of taking my life, as threatened. The second shot entered my left leg, badly shattering it. . . . I sank back to the sidewalk. I thought Mr. Boyle had fired the shots. During the time that I was sinking on the sidewalk, and immediately after, I fired three shots. When I first saw him (Boyle) when I sank he was over me on his hands and knees on all-fours. After the third shot that I fired while sinking to the sidewalk, or immediately after reaching it, was fired, Mr. Boyle, whom I saw as before stated just above me, turned over, his left hand, so to speak, seemingly using it as a pivot, turned over to my left and to the east on the sidewalk on his back. As soon as the shooting ceased a crowd gathered and among them I observed Constable Mosely, County Surveyor Barbee, my son, Herbert F. Hail, Dr. Walsh and Dr. Bolton. . . . I said to my son, Herbert, 'I hope he wasn't

badly hurt.' I also said to him, 'He,' meaning Mr. Boyle, 'had struck me on the head and broken my leg.' "

No witness, other than the defendant himself, was produced who knew or pretended to know just how the second encounter was started, or who started it. Unless, therefore, there are in the case physical facts which clearly run counter to his story of how and by whom the second and fatal difficulty was begun, the defendant's testimony upon the following points appears in the record undisputed: 1. That, when the defendant retraced his steps from his office to the point where the original difficulty and the shooting transpired, he was on his way to the Masonic lodge; 2. That, although he thought it might be probable that he would again meet the deceased that night, he did not know, as he was on his way to the lodge, that Boyle was still at the scene of the first trouble; 3. That, as he approached the point where the first assault was made, and when within a few feet thereof, he saw Boyle in a crouching position behind a tree, with his right leg thrown back and his right hand upon his hip pocket; 4. That, upon seeing Boyle in that position, the defendant changed his course on the sidewalk, leaving the center thereof and moving to the walls of the building, or on the opposite side of the sidewalk from where Boyle was standing, and thus attempted to pass the deceased; 5. That, when the defendant was about two feet west of and from the deceased and in the act of passing him, the latter suddenly sprang out and upon Hail and struck him a severe blow with his hand on the left side of the head, which blow caused the defendant to become dazed; 6. That, in the scuffle, Hail was wounded severely in the left leg above the ankle by a shot discharged from his own weapon.

There is, however, an apparent conflict in the evidence, so far as circumstances are concerned, upon the question whether Boyle was shot by Hail before or after the latter fell back upon the sidewalk.

The theory of the prosecution at the trial was, as is their position here, that Hail, having gone to his office for the express purpose of arming himself, returned to the scene of the original altercation with the hope of again meeting Boyle and with the intention of avenging the assault made by the latter upon him; that the two men met, that Hail drew his revolver and shot Boyle before any act of violence by Boyle,

and that the latter then attempted to wrest the weapon from Hail's possession; that, in the struggle that followed, Hail fired the shots that inflicted the mortal wounds in the body of Boyle and accidentally wounded himself in the leg.

There is, as already suggested, some testimony, very slight, however, which bears the appearance of supporting that theory. That two shots were discharged and that, after an interval of approximately a second, three more were fired in rapid succession, appears to be well established. Some of the witnesses for the prosecution seem to have been quite positive that all of the five shots were discharged while the two men were yet upon their feet and engaged in a struggle. The witness, Brown, for the people, testified that he heard two shots, turned around to see where they came from and that he saw Boyle "make a grab for a gun." He said further that, prior to seeing Boyle "grab for the gun," the latter did not have hold of Hail. Dr. Stewart testified that, just before the shooting, he saw Hail walking faster than his usual gait from the direction of his office to the point where the shooting occurred; that within a short interval of time thereafter he heard two shots, looked in the direction of the place where the firing took place, and that he saw a struggle going on between two men. He said that, immediately prior to the shooting, he saw no altercation or struggle in progress between the parties.

It will be observed that neither Brown nor Stewart says or makes any pretense of knowing what was going on between the two men just before they heard the first two shots—that is, they did not know and did not say whether a struggle between the two men preceded the firing of those shots. It is, however, clear, from the testimony of said witnesses, and, for that matter, from that of all the witnesses introduced by both sides that saw any part of the combat, that the deceased, if wounded by one of the first two shots, did not then receive a mortal wound. Dr. Walsh, the autopsical surgeon, testified that he found three distinct wounds in the body of the deceased, two of which were necessarily fatal and from the effect of either of which death would almost instantaneously follow. The first of these wounds described by him, besides producing damage to other parts of the upper body, lacerated and destroyed the subclavian vessels—both the vein and the artery. The doctor explained that "the subclavian artery

and vein are feeders from the aorta and just pass directly over under the collar bone and go to form the blood supply to the upper extremity. They are large vessels and a fatal hemorrhage would take place from either—from their injury—in a very few seconds." He said that a person thus wounded would likely die within fifteen seconds after receiving the wound "and would probably be unconscious in half that time." He said, in other words, that after the destruction of the subclavian blood vessels the person so injured would not be able to make a conscious movement—any movement of the body after that would be spasmodic. The second wound, in the order in which the doctor described them, while serious, was not necessarily fatal. The third "entered in the center of the breast bone, there passed a little downward and to the left and came out right at the edge of the shoulder blade on the left side of the back and then passed through the heart. In the last mentioned wound there was no hemorrhage, the heart being bloodless, from which circumstance the doctor concluded and expressed the opinion that death was caused by the wound first above referred to.

From the doctor's testimony these facts necessarily follow: 1. That the death of Boyle was practically instantaneous with the infliction of the wound which destroyed the subclavian vessels; 2. That the shot which penetrated the heart was received after life was extinct, for it is an obvious proposition that, if the deceased had still been alive when he received the shot in the heart, there would have been evidence of more or less hemorrhage in that wound; 3. That the struggle between the two men, whether they were upon their feet or down on the sidewalk, must have immediately ceased when Boyle received the wound whose effect was to destroy the subclavian artery and vein.

The next inquiry which may well be made is: Were the defendant and the deceased down on the sidewalk when the mortal wound was inflicted?

There were, it is conceded, but five shots discharged from Hail's weapon and that of these one entered the leg of Hail, three the body of Boyle and one "went wild," or, in other words, struck neither Boyle nor Hail. That the bullet which entered Hail's leg was discharged from the pistol while it was yet in the pocket of his trousers, seems to have been satisfactorily confirmed by the fact that said pocket was shown

to have a hole in it, not unlike one which might have been produced by a bullet fired through the pocket, and evidently not caused by wear, since the pantaloons were comparatively new and worn by Hail on only a few occasions before the tragedy. And, inasmuch as it appears that the effect of the wound suffered by the defendant was so to shatter the bones of his limb below the ankle as to render it impossible for him to stand upon it, he must have immediately, on receiving said wound, sunk back upon the sidewalk, and from this it would seem that he was struck by the second shot and that two shots were discharged while the weapon was still in his pocket.

The theory following from the foregoing view of the testimony is that two shots were discharged in the pocket of Hail's pantaloons before he was able to draw the weapon therefrom and that the three shots which entered the body of Boyle were discharged while the two men were in a struggle down on the sidewalk. Moreover, this theory is supported by the testimony of a number of the witnesses for the defense, they having asservated that, after the first two shots were fired, they saw Hail and Boyle fall to the sidewalk, the latter falling on top of the former, and that, after they had thus fallen, three shots were fired in quick succession, with the result that Boyle fell off of Hail and on his back on the sidewalk.

Thus it appears that the physical facts themselves coincide with and support the story of the tragedy as told by the defendant. In other words, the physical facts are not inconsistent with or contradictory to the testimony of Hail, either as to how and by whom the second trouble was started or as to how the shooting occurred. On the contrary, as stated, they seem to bear out and support his testimony as to how and at what point of time the shots were fired, while, as seen, there is absolutely no testimony contradicting his statement that Boyle started the second trouble in the manner described by him. And he was not impeached.

Under the circumstances as disclosed, no one will dispute the right of Hail, after the first assault, to have armed and thus have prepared himself to defend his person against what he had reasonable grounds for believing might be another violent and perhaps a more serious assault upon his person at the hands of his implacable enemy, between whom and himself a mere fistie contest would have been unequal or one-sided and

favorable to the deceased, because of the superiority of the latter in physical vigor and agility over the defendant, who was aged and still suffered, so he testified, from the effects of an injury to his head sustained by a fall some years before. No one will dispute the legal right of Hail to go out upon the public streets and his right to have returned by the route leading past the scene of the original difficulty to go to the Masonic lodge, of which he was a member, and to which he had been charged to carry a special message that evening, it being the regular meeting night of the lodge. It will be conceded that the story of the defendant of the second and fatal meeting, if true, disclosed a clear case of self-defense.

With the law and the only testimony showing or tending to show how and by whom the trouble between the parties at the second and fatal meeting was started thus stated, the question arises: Did the jury arbitrarily reject the defendant's testimony, or, examining it under the tests whereby the credit of human testimony must and can only be determined, did they question its verity and so exclude it as a factor or element determinative of the question of guilt or innocence?

It will be admitted that, with the exception of the fact of the homicide itself and the circumstance that the defendant resumed his way to the Masonic lodge over a course leading past the scene of the first assault, there is absolutely no affirmative testimony in the record tending to establish the crime of murder. And, if the jury rejected the testimony of the defendant, then, manifestly, there was left in the record no testimony disclosing the circumstances of the beginning of the second difficulty and, therefore, obviously, none to show that the homicide was the result of a sudden quarrel or heat of passion, the elements of voluntary manslaughter, of which the defendant was convicted.

Thus we have examined, analyzed, and considered the testimony, not because we feel justified in declaring that the evidence does not, as a matter of law, support the verdict, but to demonstrate that, while the evidence may be said to be technically, and only technically, sufficient to uphold the jury's conclusion, there appears to exist a doubt of the gravest character of the guilt of the accused of any crime, and thus to illustrate the seriousness of the point, vigorously urged against the validity of the verdict, involving the charge that the district attorney, in his argument to the jury unwarrantably used

language whereby the defendant was deprived of a fair and impartial trial.

Thus we are brought to the consideration of the point just mentioned.

Preliminarily, it is objected by the attorney-general that the point involving the asserted misconduct of the district attorney cannot be reviewed either on an appeal from the judgment or the appeal from the order denying a new trial, except where it is made to appear that by some ruling respecting the alleged misconduct the court has made an error which could be made the ground of a motion for a new trial. As sustaining this position the attorney-general cites the cases of the *People v. Amer*, 151 Cal. 303, [90 Pac. 698], and *People v. Amer*, 8 Cal. App. 137, [96 Pac. 401].

In the first mentioned case it is said: "In view of the fact that the misconduct of the district attorney has so often been held to constitute a sufficient ground for reversal of the judgment, it may be that it has become a settled rule that the question of the misconduct of the district attorney will be considered upon an appeal from the judgment when presented by a proper record and the points saved for review by exception."

In the second case referred to it is said that "there is no authority whatever in the statute for holding that such misconduct of the district attorney, aside from any ruling of the court in reference thereto, can be properly reviewed on appeal from the judgment unless it is a ground for a motion for a new trial." It is further said in that case that "if any other rule has been established, it must be by virtue of judicial legislation." In this case, however, the court refused to take any heed of the objection of the attorney for the defendant to the remarks of the district attorney constituting the alleged misconduct of that officer in his address to the jury, and in this we think the court committed an error which could properly be made the basis of a motion for a new trial. We are of the opinion, therefore, that the question of the misconduct of the district attorney, exception to such misconduct having been reserved and presented here by a proper record, may be reviewed on the appeal from the judgment. (See *People v. Pang Sui Lin*, 15 Cal. App. 263, [114 Pac. 582].)

In the course of his argument to the jury, the district attorney said: "Men have been acquitted who have committed cold-

blooded murder, and if you were to acquit this man under the testimony here you would be allowing a cold-blooded murderer with human gore yet dripping upon his hands to go unwhipt of justice; gentlemen, you cannot do it, you will not do it. *Should you do it you would be afraid to go out on the street and meet your fellow-men."*

Counsel for the defendant, immediately upon the utterance of said language, assigned it as error and moved the court to instruct the jury to disregard it. As before stated, the court in effect refused, or, at any rate, omitted to do so, saying: "I don't understand it; to me it doesn't mean anything; proceed."

That the effect of the statement that the jurors, in the event that they acquitted the defendant, would be afraid to go out upon the public streets and meet their fellow-men, was to intimidate or influence them to return a verdict of conviction, regardless of their views as to the effect of the evidence, cannot for a moment be doubted. Whether the language referred to was used in good faith or for the purpose of influencing a verdict, is immaterial. The vice and damaging effect of the utterance upon the rights of the accused remained. In a case where evidence of guilt was overwhelming or conclusive, we might justly say that the language was not prejudicial in its effect upon the legal rights of the defendant, although the use of such language would in such case be none the less reprehensible. But this is, as we have shown, not such a case.

Both the defendant and the deceased were professional men—the one a journalist, actively engaged in following his profession, the other a lawyer, actively prosecuting the practice of his profession. They were, therefore, prominent and conspicuous characters in the county of Plumas and in its civic and social affairs. Both had resided in that county for many years and, we have the right to assume, were respected citizens thereof. In the very nature of things, therefore, the tragedy must have aroused great excitement among the people of said county and have provoked a high state of public feeling. Doubtless, as is invariably so in such cases, where the actors are prominent and well known, the people of the community took sides and were pronounced in their partisanship on the one side or the other. 'This condition of the public mind we cannot and do not take judicial notice of, but from common experience we know that it will arise and exist on

occasions such as the one responsible for this case in a comparatively small community, in point of population, where everybody has more or less personal acquaintance with everybody else. Hence, in such a case, where, as here, there is a manifest paucity of evidence tending to establish the guilt of the defendant, language such as the district attorney used in this case in his address to the jury must have had and should be held to have had the effect of denying to the accused that fair and impartial trial before a jury of his fellow-men guaranteed by the law to every person put upon his trial for his life or his liberty.

The language complained of amounts, substantially, to a direct declaration to the jury that, if they did not convict the defendant, they would lose the respect and confidence of their friends and neighbors. Thus the question of the honesty and the integrity of the jury was injected into the case. In other words, the jurors themselves were put upon trial by the district attorney, and whether they could bravely meet their fellow-citizens and face them with clear consciences was made by that official to depend upon whether they found the defendant guilty.

A public prosecutor represents all the people, of whom every person accused of violating public law is none the less one because he is so accused. He represents the majesty of the law, which stands for the protection of every citizen against the taking of his life, his liberty or his property without its due process—the law which condemns rather than commands the conviction of a person of a public offense upon insufficient evidence or by unfair means. That official should always do his sworn duty, of course, but he should always do it fairly and justly and not permit the great power with which he is clothed to be converted into an instrument of persecution. He should, as indeed any lawyer should, in his address to a jury, remain strictly within the record and not attempt to evolve any theory or to import into the case any features not fairly and reasonably justified by the proofs.

In this case the district attorney's address to the jury fairly reeked with violent abuse of the defendant and other declarations not warranted by the evidence or fairly within the bounds of the record or any theory reasonably deducible therefrom. He repeatedly characterized the defendant as a cold-blooded murderer and often misstated the law of the case. He

accused the defendant of having caused the hole to be made in his pantaloons pocket, where he carried his pistol, after the homicide occurred, when, as a matter of fact, there was not a scintilla of evidence to warrant the accusation. He made insinuations as to the contents and character of the article published in the defendant's newspaper, after the court had excluded it from the record. No exceptions were reserved by the defense to any of the declarations thus adverted to, but we here refer to them merely as indicating the general manifestly unfair attitude of the district attorney toward the accused and as disclosing a determination on his part to secure a conviction. Whether, as before suggested, that officer was actuated in his argument by a firm conviction of the guilt of the defendant or was thus carried away from the record by permitting his zeal to usurp the place of his better judgment, as is too often true with public prosecutors, we cannot say, nor is it necessary to inquire, since the palpable effect of his language upon the jury—the language to which exception was reserved—is the end of the inquiry here.

The cases are replete with severe arraignments of prosecuting officers for unfairness in the presentation of cases against persons accused of crime, and there have been very justly recorded many reversals for misconduct no more obnoxious than that complained of in the case at bar. The number of such cases is so large that it would greatly extend the length of this opinion—now more extended than had been desired—to attempt to notice all of them. We shall examine a few of them, however.

In the case of the *People v. Bowers*, 79 Cal. 415, [21 Pac. 752], the language used in animadverting upon the conduct of the district attorney for referring in his argument to the jury to matters *de hors* the record, has peculiar application to the present case. The court, after an examination of the evidence, said: "We do not feel like saying, under these circumstances, that as a matter of law the jury could not be satisfied beyond a reasonable doubt of the guilt of the defendant, but it is evident that the case was one of great difficulty, and required unusual circumspection, and the utmost coolness and impartiality in its consideration. . . . In view of all these circumstances, certain occurrences at the trial have a significance which in a different kind of a case we should hesitate to attribute to them. Unfortunately, the judge allowed himself

rather frequently to question the witnesses, always in the interest of the prosecution, and often by putting questions which were leading and suggestive. We think the jury would be sure to get the impression that the judge thought the defendant guilty. Still more objectionable was the conduct of the prosecuting attorney. It is true, the court properly interfered, rebuking the attorney, and instructing the jury to pay no attention to the statements. But the statements were well calculated to influence the jury in a case of this character, and it is impossible for us to say that no injury resulted to the defendant therefrom."

In *People v. Ah Lean*, 92 Cal. 282, [27 Am. St. Rep. 103, 28 Pac. 286], the supreme court, in reversing the judgment upon the ground that the prosecuting attorney in his address to the jury imported into the case matters which were not brought there by proof, said: "It follows that the only safe and just rule to follow in such cases is to make it impossible for a party to obtain any advantage from such misconduct of counsel by promptly granting a new trial to the adverse party." The court in that case also approvingly quotes the following language, most pertinent and forceful in its application to this case, from the case of *Tucker v. Henniker*, 41 N. H. 319: "When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence violated, and the full benefit of trial by jury is denied. It may be said, in answer to these views, that the statements of counsel are not evidence, that the court is bound to so instruct the jury, and that they are sworn to render their verdict only according to evidence. All this is true; yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they, in the slightest degree, influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them. It is unreasonable to believe the jury will entirely disregard them; they may think they have done so, and still be led involuntarily to shape their verdict under their influence."

In the case of the *People v. Mull*, 167 N. Y. 247, [60 N. E. 629], the New York court of appeals not only reversed the cause because of unwarranted statements by the district attor-

ney in his address to the jury, but severely animadverted upon what seems to be a growing practice with prosecuting attorneys to travel beyond the records of criminal cases in their arguments to secure convictions. In that case, the district attorney, in his argument, among other equally reprehensible statements, said: "And if there is a man that sits in those chairs that is willing to brand himself with suspicion by saying Archie Mull did not commit this crime, my judgment of his character is not correct. . . . Don't let it be said of you from all the integrity and virtue and respectability of this great county, twelve men cannot be gotten together who will do justice. A failure to convict in this case, where there is no defense and where there is no doubt, cannot fail to create again another epidemic of murder in this county. It cannot fail to bring within our borders hordes of desperadoes and criminals, who rely upon the puerile inefficiency and weakness of jurors here, and will select this as a safe field in which to operate. The consequences of your failure to convict in this case, in my judgment, cannot be weighed or gauged or measured at all. How could a more brutal, wanton and pathetic tragedy be committed than this? . . . It seems to me to have been the purpose of the Almighty, in His stern and inscrutable justice, to have saved the life of this boy, to tell you who perpetrated this fiendish and unholy deed. But for the miraculous and almost divine rescue of this eye-witness from the very jaws of death, there might be a failure of justice; but a failure by you now to convict and punish the murderer would seem to me to be a mimicry and mockery against God." The court, addressing itself to those statements by the district attorney, made, *inter alia*, the following pointed observations: "The trial jury aims to secure popular justice. The rules respecting the admission of evidence suffice to protect the defendant from prejudice by irrelevant and hearsay testimony, and declarations unsupported by evidence. It is the right of the people, no less than of the accused, to address the jury upon every matter legitimately bearing upon the case. The general rule is that each party must keep within the evidence. But the evidence may be examined, collated, sifted, and treated in his own way. Whatever of argument, suggestion, or inference can be constructed or deduced from it in support of guilt, upon the one hand, or of inconsistency, confusion, doubt, and uncertainty in support of innocence, upon

the other, is permissible, and may be presented with ingenuity, persuasion, vehemence, fervor and effectiveness. . . . But it is nevertheless true that the verdict should be impartial and be pronounced upon the evidence and according to the evidence. It follows that the address of counsel must be upon the evidence and according to the evidence. It is greatly to be feared that the remarks of the district attorney, in view of the former disagreement of the jury, and the positive though unproven assertions of the district attorney during the episode upon bribery, intimidated the jury. Why should a failure to convict excite widespread indignation? And upon whom should it fall? What juror was willing to be thought so callous to public opinion, the respect of his fellow-citizens, reckless of his oath, heedless of the welfare of his family, willing to brand himself with suspicion, unwilling to do justice, and willing to acquit a murderer, whose guilt had been made clear by the testimony of an eye-witness, seemingly saved from death by a miraculous and almost divine rescue, according to the purpose of the Almighty, in order to prevent a failure of justice? Clearly, we ought not to allow a verdict to stand to the securing of which such methods and influences were thought by the public prosecutor to be necessary. If it be said that in the case before us there is no reasonable doubt of the defendant's guilt, it should be remembered that it is not for the courts, but for the jury, to say this by their free and impartial verdict; and we cannot know that they have said it, when we do know that they were told by the district attorney, and his statement was enforced by previous declarations of attempted bribery and his precautions against their success, that their own good reputation was in jeopardy and could only be saved by convicting the defendant."

Thus we have presented excerpts from a few of the cases upon the proposition under review, not for the reason that it is not clear in principle that reversals should be ordered where public prosecutors resort to the practice of bringing into their cases under the guise of argument or otherwise matters wholly outside the records and which are obviously calculated to influence juries, either consciously or unconsciously, in arriving at verdicts of guilty, contrary to the evidence and the law, but to show how such practice is uniformly condemned in strong language by the higher courts.

There are innumerable other cases in which similar views are expressed and like conclusions reached, and the practice referred to severely and justly condemned. It is not necessary here to review those cases, but among them the following will be found to be cogently applicable to the case at bar and instructive upon the question in hand: *People v. Fielding*, 158 N. Y. 542, [70 Am. St. Rep. 495, 46 L. R. A. 641, 53 N. E. 497]; *People v. Butler*, 8 Cal. 435; *Vickers v. United States*, 1 Okl. Cr. 452, [98 Pac. 467, 473]; *State v. Kauffmann*, 22 S. D. 433, [118 N. W. 337]; *State v. Underwood*, 77 N. C. 502; *State v. Bobbst*, 131 Mo. 328, [32 S. W. 1149]; *People v. Devine*, 95 Cal. 231, [30 Pac. 378]; *People v. Ho Kim You*, 24 Cal. App. 451, [141 Pac. 950]; *People v. Fleming*, 166 Cal. 357, [133 Pac. 291]; *People v. Tufts*, 167 Cal. 266, [139 Pac. 78].

Our conclusion is that, with the defendant's guilt very doubtful under the evidence, the remarks of the district attorney above quoted were most damaging to the legal rights of the accused, that thereby he was deprived of a fair and impartial trial, and that the result reached by the jury, if permitted to stand under the circumstances, would involve a miscarriage of justice.

The judgment and order are reversed and the cause remanded.

[Civ. No. 1618. Second Appellate District.—September 8, 1914.]

HARRY G. JOHNSON, Petitioner, v. LEWIS R. WORKS,
Judge of the Superior Court of Los Angeles County,
Respondent.

NEW TRIAL—SETTLEMENT OF STATEMENT—MANDAMUS TO COMPEL.—

Mandamus lies to compel a trial judge to settle a statement of the case on a motion for a new trial, although no transcript is furnished him of so much of the evidence as is necessary to explain the specifications attached to the plaintiff's motion, where the proposed statement conflicts with the proposed amendments of the defendant.

IN.—DUTY OF JUDGE TO ACT—SUFFICIENCY OF STATEMENT.—It is the duty of the judge, in some form and to the best of his ability to remember what occurred at the trial, to settle the statement; but if the petitioner has not furnished a transcript of the testimony, and

a long time has elapsed since the trial, he cannot complain if the statement as approved is in more general terms with respect to the evidence contained therein than it would be if the exact terms of the testimony were embodied in a transcript.

PETITION for a Writ of Mandate to be directed to a Judge of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

L. B. Stanton, for Petitioner.

J. W. Hart, for Respondent.

CONREY, P. J.—The petitioner Harry G. Johnson is the plaintiff in a certain action against one M. A. Copps in the superior court of Los Angeles County, in which action the plaintiff seeks to recover a share of commissions alleged to have been earned by plaintiff and defendant on account of services in selling certain real property. Upon issues presented by the pleadings that action was tried before the respondent herein as judge of said superior court, and judgment was entered in favor of the defendant. The plaintiff duly served and filed a notice of intention to move for a new trial upon the ground that the evidence was insufficient to justify the decision, and upon other grounds stated. Within due time the plaintiff served and presented for settlement a proposed statement on the motion for a new trial and the said proposed statement, with the defendant's proposed amendments thereto, came before the respondent for settlement. The proposed statement purports to set forth all of the evidence and proceedings at the trial. By his proposed amendments defendant asks that portions of the proposed statement be stricken out and other testimony substituted therefor.

The proceedings at the trial were taken down by an official reporter but no transcript thereof has been made. The petitioner alleges that when the statement and amendments came before the respondent for settlement, respondent refused to make any settlement thereof. Respondent in his return to the alternative writ issued herein sets forth facts showing that the attorneys for plaintiff and defendant failed to agree with respect to said proposed amendments; or, in other words, that the plaintiff refused to accept said amendments. Respondent says that neither the statement as proposed by plaintiff nor the proposed amendments nor the two taken together contain

a true or fair statement of the evidence necessary to explain plaintiff's specifications attached to his notice of intention to move for a new trial; that there was other competent and relevant evidence upon said matters. Respondent denies that he has refused to settle the statement of the case, but in substance declines to do so unless a transcript is furnished to him of so much of the testimony of the witnesses as is necessary to explain the specifications attached to plaintiff's motion for a new trial where the proposed statement of plaintiff conflicts with the proposed amendments of the defendant.

It is the duty of respondent to settle the statement by determining what it shall contain. The law will not require of him that which is impossible of performance. If his memory is not sufficient to enable him to determine what the statement of facts shall be upon any issue presented, there are presumptions upon which he may act, taking into consideration the condition of the record and the duty of the party moving for a new trial to present a reasonably clear and accurate statement upon which the judge may act. It is not our duty at this time to say how the respondent shall settle the statement on motion for new trial under the peculiar circumstances of this case, nor in what form he shall make a statement showing that there is evidence (as he says that there is) supporting the findings of the court, and that such evidence is in addition to that contained in plaintiff's proposed statement. It is sufficient at this time to say that in some form and to the best of his ability to remember what occurred at the trial, it is the duty of the judge to settle the statement. In view of the fact that petitioner has not furnished respondent with a transcript of the testimony, and in view of the delay which occurred between the time of the trial and the time of attempted settlement of the statement, the petitioner cannot justly complain of the action of the court if the statement as approved by the respondent shall be in more general terms with respect to the evidence contained therein than it would be if the exact terms of the testimony were embodied in a transcript. (*Vatcher v. Wilbur*, 144 Cal. 536, 541, [78 Pac. 14].)

We are of the opinion that a peremptory writ should issue requiring respondent to settle said statement, and it is so ordered.

James, J., and Shaw, J., concurred.

[Civ. No. 1573. Second Appellate District.—September 4, 1914.]

MIDWAY FIVE OIL COMPANY (a Corporation), Appellant, v. CITIZENS NATIONAL BANK OF LOS ANGELES (a Corporation), Respondent.

GARNISHMENT—ACTION AGAINST GARNISHEE—SUFFICIENCY OF COMPLAINT.—A complaint in an action against a garnishee banking corporation which alleges "that summons and writ of attachment were duly issued; that thereafter on the said date the plaintiff caused the said writ of attachment to be served and said writ of attachment was on said date duly served upon said defendant banking corporation," is not insufficient, in the absence of special demurrer, in failing to show service of the writ of attachment.

ID.—FUNDS SUBJECT TO GARNISHMENT—CERTIFIED CHECK.—Where a bank, holding a promissory note for collection, accepts a certified check in payment, it is chargeable as garnishee for the amount thereof less any indebtedness to it of the payee of the note.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Finlayson, Judge.

The facts are stated in the opinion of the court.

Horace S. Wilson, and W. W. Middlecoff, for Appellant.

S. E. Vermilyea, and S. L. Carpenter, for Respondent.

JAMES, J.—This appeal is taken from a judgment entered in favor of the defendant and respondent and is presented on the judgment-roll alone.

From the facts found by the trial judge, it appears that one Henningsen was indebted to plaintiff in the sum of \$1595.49; that in September, 1911, an action was commenced by the appellant herein against the said Henningsen to secure a judgment on account of that indebtedness, and that on the fourth day of January, 1913, judgment was duly entered for the amount stated and thereafter execution was regularly issued; that after the commencement of the action referred to and before the entry of judgment, a writ of attachment was regularly issued and served upon the respondent herein; that respondent made answer to the garnishment, returning to the sheriff that it was not indebted to nor was it holding any properties or moneys of the said Henningsen. From the facts

further found it appears that in August, 1911, Henningsen had owing to him from one Martin a sum of money amounting to three thousand seven hundred dollars, evidenced by a promissory note; that this note was then in possession of respondent, and Henningsen instructed respondent to collect the amount due from Martin on the note and deliver certain certificates of stock to Martin in connection with the same transaction; that respondent did deliver the stock to Martin and accepted in payment a certified check drawn upon the First National Bank of Pasadena payable to the order of Martin; that the said check was collected by respondent bank in the due course of business from the First National Bank of Pasadena. It was while this certified check was in the hands of respondent bank that the garnishment process was served. After collecting the amount represented by the certified check, respondent applied of the proceeds thereof the sum of \$2146.34 immediately in extinguishment of an indebtedness owing by Henningsen to it, and thereafter it honored an overdraft drawn by Henningsen in the sum of one thousand dollars and charged the same against the balance of the credit made in Henningsen's favor upon the collection of the certified check, leaving on open account a credit balance of \$553.66, which was afterwards paid over to Henningsen.

It is contended that the complaint did not state facts sufficient to state a cause of action in that the allegation showing the facts as to the service of the writ of attachment was not complete. We think the complaint did, in the absence of a special demurrer, state sufficient facts to sustain a cause of action on behalf of appellant. It was alleged: "That summons and writ of attachment were duly issued; that thereafter on the said date the plaintiff caused the said writ of attachment to be served and said writ of attachment was on said date duly served upon said defendant banking corporation." In the answer of respondent there was no denial of this allegation, that portion of the answer referring thereto being worded as follows: "Defendant denies that at the time of the service upon it of the writ of attachment in the complaint mentioned it had in its hands, or in its possession, moneys subject to check by or order of R. M. Henningsen. . . ." The chief point relied upon by respondent to sustain the judgment of the court as entered is that it did not appear from the findings of the court that at the time of the service

of the process of garnishment respondent had in its hands or under its control any money or property belonging to Henningsen, or that it was indebted to him in any amount. This contention, we think, cannot be sustained. It appears from the facts as found that Henningsen directed the respondent bank to deliver the certificates of stock and satisfy a debt owing to him by Martin when it should receive the amount of money represented in Martin's promissory note. The bank, then, when it accepted the certified check accepted the same as cash and it would have been estopped as against the claim of Henningsen to deny that it had collected the debt for his credit. It seems to be the rule that where an agent or trustee receives an evidence of indebtedness on account of its principal instead of money, by the express authority of its principal, then it might properly answer, as did this bank, that it was not indebted to the principal in any amount. In this case, however, as has been pointed out, respondent at its own risk accepted as cash the certified check, and it must be held to have immediately become indebted to Henningsen in the amount which that check represented. As sustaining this view are the cases of *Hancock v. Colyer*, 99 Mass. 187, [96 Am. Dec. 730]; *Knight v. Bowley*, 117 Mass. 551. There is no contention but that the bank had the right to offset against the proceeds of the certified check any matured indebtedness owing to it by Henningsen, but it appears that the last amount of overdraft, to wit, the sum of one thousand dollars, had not accrued at the time of the service of the garnishment. Its liability to appellant was, therefore, the sum of \$1553.66.

The judgment is reversed, with directions to the trial court to enter, upon its findings of fact as made, judgment in favor of appellant in the sum of \$1553.66, and that appellant have its costs incurred upon this appeal.

Conrey, P. J., and Shaw, J., concurred

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 2, 1914.

[Crim. No. 256. Third Appellate District.—September 4, 1914.]

**THE PEOPLE, Respondent, v. WILLIE DEEN WEST et al.,
Appellants.**

CRIMINAL LAW—HOMICIDE COMMITTED BY INMATE OF INSANE ASYLUM

—**SUBMISSION OF QUESTION OF INSANITY TO JURY.**—Where inmates of an insane asylum, who have not been cured or discharged, commit a homicide in attempting to escape, the court must, on motion made before their trial for murder, submit the question of their present insanity to a jury as provided by section 1868 of the Penal Code.

ID.—INSANITY—COMPETENCY OF ACCUSED TO MAKE DEFENSE.—The question thus presented to the court is different from that involved in the consideration of whether the defendants are responsible for the alleged homicide. As to their responsibility for the crime charged, the inquiry must be whether they knew the difference between right and wrong and could distinguish the quality and consequence of their act, but here the question is whether they are mentally competent to make a rational defense.

ID.—INSANITY OF ACCUSED—DISCRETION OF COURT IN SUBMITTING QUESTION TO JURY.—There is no discretion left in the court, in the matter of submitting the question of the sanity of a defendant to a jury, when a doubt arises as to his sanity; and ordinarily if there are statements under oath of a credible person or persons that he is insane, such doubt is or should be raised and the question must be submitted to a jury. The only contingency is, Does doubt arise?

ID.—JURY TO TRY INSANITY—WHEN MUST BE IMPANELED.—If information comes, from a proper source and through proper channels, that the defendant is insane, or if, through observation and personal inspection, the information is disclosed to the court, a jury must be impaneled to pass upon his mental condition.

ID.—RESPONSIBILITY FOR CRIME—ABILITY TO MAKE DEFENSE.—A person may be sane enough to be responsible for a crime and yet incapable of making his defense, and, on the other hand, he may have mental capacity to be placed on trial and yet be insane within the contemplation of the law as to responsibility for a criminal act.

APPEAL from a judgment of the Superior Court of Mendocino County and from an order refusing a new trial.
J. Q. White, Judge.

The facts are stated in the opinion of the court.

Theodore Hale, for Appellants.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

THE COURT.—A rehearing in these cases was granted by this court and, upon further consideration, we have concluded that the judgment should be reversed and a new trial granted.

The defendants were convicted in the superior court of the crime of murder in the second degree and sentenced to the penitentiary for life. At the time of the homicide, November 28, 1913, they were inmates and patients at the Mendocino state hospital for the insane and deceased, at the time of his death, was also an inmate and patient of said institution. Before the trial the defendants regularly moved the court that the question of their present sanity be submitted to a jury as provided by section 1368 of the Penal Code. The court denied the motion and in this we think prejudicial error was committed.

In support of said motion the defendants introduced and read the affidavit of one of their counsel, Mr. Hale McCowen, Jr. From this affidavit it appeared that, at the time of the homicide, the defendants were confined in the hospital as insane persons and were being treated as such and that neither had been discharged as cured or at all; that the defendant Peoples had been sent to the hospital upon the certificates of two surgeons of the United States navy at Puget Sound, Washington, dated October 24, 1913. West was committed from the penitentiary at San Quentin upon the certification of the warden, the resident physician and surgeon, and the captain of the yard, that West was insane. The commitment was dated November 10, 1913. It is thus to be noticed how closely their commitment was followed by the homicide, and, it may be stated, the trial occurred soon thereafter.

Mr. McCowen further set out in his affidavit that both he and his associate "have each made efforts to secure from the said defendants some statement concerning the crime charged in the information; that said defendants refuse to say anything about the facts or circumstances of the offense and act as though suffering from delusions of some character. That affiant therefore alleges that it is his opinion that both of these defendants are mentally insane; and that neither of them is mentally competent to make a just and rational defense to the charge made against them."

It must be admitted that there was thus presented a very strong showing of present insanity. It is asserted by appellants' counsel that the facts "constitute the strongest showing

of present insanity which has ever been brought to the attention of a court in any case which has been appealed. We have examined the cases found in the reports, yet have found no case where an alleged crime was committed by insane men, who were being confined in a public hospital for the insane and had never been cured, nor ordered discharged and who continued in such a state of mental derangement that attorneys appointed by the court to defend them could obtain no assistance from the defendants in the conduct of their case." We have not examined all the cases to verify the said assertion but we are satisfied that upon the showing made the trial judge should have arrested the proceedings to have the sanity of the defendants determined by a jury.

Upon mature consideration we do not think the counter showing made by respondent was sufficient to justify the court in its denial of the motion.

It may be added that the conduct and statements of the defendants during the progress of the trial furnish additional evidence that they were incapable of making their defense, but we forbear any recital in detail of these circumstances.

We do not mean, of course, to decide that the defendants were insane at the time of the homicide or that at the time of the trial they were incapable of making their defense, but our decision goes only to the extent that the court should have submitted the last question to a jury prior to any trial for the offense charged.

The principle involved has been stated no more aptly, probably, than in the familiar quotation from Blackstone: "Also, if a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he had pleaded, the prisoner becomes mad, he shall not be tried—for how can he make his defense? If after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced and if after judgment he becomes of nonsane memory execution shall be stayed, for, peradventure, says the humanity of English law, had the prisoner been of sound memory he might have alleged something in stay of judgment and execution."

It cannot be too strongly emphasized that the question presented to the court was different from that involved in the

consideration whether the defendants were responsible for the alleged homicide. As to their responsibility for the crime charged the inquiry must be whether they knew the difference between right and wrong and could distinguish the quality and consequence of their act, but here the question was whether they were mentally competent to make a rational defense.

In re Buchanan, 129 Cal. 330, [50 L. R. A. 378, 61 Pac. 1120], the supreme court held that there is a difference between the medical view of insanity and the view upon which the statute is founded and that the question must be determined with reference to the latter, and, after making the foregoing quotation from Blackstone, the opinion by Chief Justice Beatty proceeds: "This short quotation shows what all the books and treatises and decisions on the subject show, that the true and only reason why an insane person should not be tried is 'that he is disabled by the act of God to make a just defense, if he have one.' "

We need not attempt a more accurate discrimination between the insanity that excuses crime and the insanity that arrests the trial although the distinction has been the subject of learned discussion in some of the decisions. Of course, a person may be sane enough to be responsible for crime and yet incapable of making his defense, and, on the other hand, he may have mental capacity to be placed on trial and yet be insane within the contemplation of the law as to responsibility for a criminal act.

And finally, as to the showing required to make it the duty of the court to submit the question of sanity to a jury, there is no discretion left in the court when a doubt arises as to the sanity of the defendant. And ordinarily, at least, if there are statements under oath of a credible person or persons that the defendant is insane, a doubt is or should be raised as to the defendant's sanity and the question must be submitted to a jury. The only contingency is, Does a doubt arise? If information comes, through a proper source and through proper channels, that the defendant is insane, or if, through observation and personal inspection, the information is disclosed to the court, a jury must be impaneled to pass upon the mental condition of the accused. (*Marshall v. Territory*, 2 Okl. Cr. 136, [101 Pac. 139]; *People v. Ah Ying*,

42 Cal. 18; *Freeman v. People*, 4 Denio (N. Y.), 9, [47 Am. Dec. 216].)

We do not mean to say that the weight of the evidence and the credibility of the witnesses are not within the peculiar province of the trial judge, but we think that the circumstances here were such that it should be held as a matter of law that a doubt was or should have been created and that it was the court's duty to submit the question as provided in section 1368 of the Penal Code.

We deem it unnecessary to notice specifically the cases cited by counsel or to discuss other points made by appellants as they will probably not arise again.

The judgment and order are reversed.

[Crim. No. 261. Third Appellate District.—September 4, 1914.]

THE PEOPLE, Respondent, v. JACK AKENS, Appellant.

CRIMINAL LAW—CHARGING RAPE UPON FEMALE UNDER AGE OF CONSENT
—**CONVICTION OF ASSAULT TO COMMIT RAPE.**—A verdict of guilty of assault with intent to commit rape is without the scope of an information charging an act of sexual intercourse with a female under the age of consent.

ID.—ATTEMPT TO COMMIT RAPE—FEMALE UNDER AGE OF CONSENT.—In a prosecution under such information it is error to instruct the jury that if the defendant attempted to rape the prosecutrix but failed in accomplishing his purpose, he may be found guilty of an assault with intent to commit rape.

ID.—ASSAULT TO COMMIT CRIME—ATTEMPT TO COMMIT CRIME.—An "assault" with intent to commit crime necessarily embraces an "attempt" to commit the crime, but the "attempt" does not necessarily include an "assault."

ID.—EXAMINATION OF DEFENDANT BY PHYSICIAN.—In a prosecution for rape the defendant cannot be required to submit to an examination by a physician.

ID.—VIEW OF PREMISES—JURY TO BE ACCOMPANIED BY JUDGE AND DEFENDANT.—If in such prosecution the jury should be sent to view the premises where the crime was committed, they should be accompanied by the judge and by the defendant if he desires to go.

APPEAL from a judgment of the Superior Court of Butte County and from an order refusing a new trial. H. D. Gregory, Judge.

The facts are stated in the opinion of the court.

J. Oscar Goldstein, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones,
Deputy Attorney-General, for Respondent.

BURNETT, J.—Defendant was charged with having had carnal intercourse with a female under the age of consent and he was convicted of “assault with intent to commit rape.” Several reasons are urged by appellant for reversal but the most serious question, which is not discussed or suggested at all, is whether the verdict is within the scope of the information—in other words, whether the defendant was convicted of a different crime from that charged against him.

The charging part of the information is that “The said Jack Akens did on or about the 12th day of May, A. D. 1913, at Butte County and state of California, and before the filing of this information, wrongfully, unlawfully, willfully and feloniously accomplish an act of sexual intercourse with one Nora Heckart, the said Nora Heckart being then and there a female under the age of sixteen years, to wit, of the age of eleven years, and not being then and there the wife of the said Jack Akens.” It is thus to be seen that the element of *force* is not charged, as indeed it is not required to constitute the offense of *rape* on the person of a female under the age of consent. The crime of *assault* with intent to commit rape necessarily implies, however, the use of *force* and *violence* and negatives the idea of consent upon the part of the victim. Of course, if the defendant had been charged with rape on the person of an adult the element of force would have been included in the charge and thus the information would have comprehended the crime of which he was convicted. Or, if the defendant had been convicted of an “attempt to commit rape” we could say that it was covered by the charge because every crime includes an attempt to commit said crime. But “an assault implies repulsion or at least want of consent on the part of the person assaulted.” (*People v. Dong Pok Yip*, 164 Cal. 146, [127 Pac. 1032].) An “assault” with intent to commit a crime necessarily embraces an “attempt” to commit said crime but said “attempt” does not necessarily include an “assault.” This distinction

was overlooked by the court in giving the following instruction: "You are instructed that if you believe to a moral certainty and beyond all reasonable doubt that Jack Akin attempted to rape Nora Heckart but did not succeed in accomplishing sexual penetration then you may find him guilty of an assault with intent to commit rape."

The instruction was given upon the supposed authority of *People v. Gardner*, 98 Cal. 127, [32 Pac. 880], but in that case as is stated by the supreme court, "The defendant was convicted of an attempt to commit rape, and not of the offense of an *assault* with intent to commit rape for which provision is made by section 220 of the Penal Code. There is a distinction between these offenses, and the facts required to prove an attempt are not necessarily sufficient to prove an assault with intent."

A case directly in point is *State of Nevada v. Pickett*, 11 Nev. 255, [21 Am. Rep. 754]. In the opinion, written by the late Chief Justice Beatty of this state, who was then an associate justice of the supreme court of Nevada, it is said: "The common law definition of rape is 'the carnal knowledge of a woman forcibly and against her will.' (4 Blackstone's Commentaries 210.) The same definition is adopted by our statute. (Comp. Laws, sec. 2350.) Under this definition, an assault is a necessary ingredient of every rape, or attempted rape. But it is not a necessary ingredient of the crime of carnally knowing a child under the age of twelve years, with or without her consent, which is defined in the latter part of the section, and which is called rape. It is obvious that here are two crimes differing essentially in their nature though called by the same name. To one force and resistance are necessary ingredients, while to the other they are not essential; they may be present, or absent without affecting the criminality of the fact of carnal knowledge. . . . By virtue of the provisions of sections 2464 and 2037 this defendant might have been convicted of an 'attempt to commit rape' even if the child consented to all he did; but it was error to instruct the jury that he could be convicted of 'assault with intent,' etc., in that case. There can be no assault upon a consenting female, although there may be what the statute designates a rape." The case was reversed for the error of the court in giving an instruction similar to the one given herein as above set out.

The same criticism might be made of the instruction given here but in addition we think the verdict does not respond to the averments of the information. This is not a technical objection but it goes to the fundamental right of the defendant to be formally charged with the crime of which he may be convicted.

In the event of a new trial the alleged errors discussed by counsel will probably not appear again. However, it may be stated that the defendant cannot be required, against his consent, to submit to an examination by a physician, and if the jury should be sent to view the premises they should be accompanied by the judge and the defendant if he desires to go.

For the reason stated we think the judgment and order should be reversed and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1522. Second Appellate District.—September 5, 1914]

NEW YORK LIFE INSURANCE COMPANY (a Corporation), Appellant, v. SARAH M. DALEY, Respondent.

LIFE INSURANCE—PREMIUM NOTE—EXECUTION BY AGENT OF BENEFICIARY—LIABILITY OF BENEFICIARY.—The beneficiary in a life insurance policy, who is not shown to have a vested interest therein, is not liable on a promissory note given for the premium by her agent under a general power of attorney restricting his authority to such acts as are for her "use and benefit."

ID.—INTEREST OF BENEFICIARY IN INSURANCE—WHEN NOT VESTED.—Where a policy of life insurance reserves to the insured the right to change the beneficiary upon written request therefor, the interest of the designated beneficiary prior to the death of the insured is that of a mere expectancy of an incompleting gift, subject to revocation at the will of the insured.

ID.—POWER OF ATTORNEY—RULES OF INTERPRETATION.—A formal instrument conferring authority to bind another must be construed strictly in accordance with the plain import of the language of the document, and its interpretation cannot be extended by implication so as to authorize acts beyond those specified, unless absolutely necessary to carry out the powers expressly delegated.

Id.—GRANTING NONSUIT—NECESSITY OF FINDINGS.—Where the record discloses the grounds upon which a motion for nonsuit is based, and the motion is properly granted, findings of fact are not necessary.

APPEAL from a judgment of the Superior Court of San Diego County. W. A. Sloane, Judge.

The facts are stated in the opinion of the court.

A. C. Mouser, for Appellant.

Sam Ferry Smith, for Respondent.

SHAW, J.—This is an appeal from a judgment of dismissal of an action upon granting defendant's motion for a nonsuit.

The action is one to recover payment upon a promissory note alleged to have been made and delivered to plaintiff by defendant. It appears that in 1894 plaintiff issued to T. J. Daley, husband of defendant, a policy of life insurance wherein defendant was named as beneficiary, payment of the premium upon which was made by a promissory note in the sum of \$437, signed by T. J. Daley and Sarah M. Daley, the defendant, by T. J. Daley, her attorney in fact. Shortly after the execution of this note the insurance policy was canceled. Upon default being made in the payment of the note, the same was renewed, the renewal note being likewise signed by defendant through T. J. Daley as her attorney in fact. The subject of this suit is a note thus given in renewal as evidence of the indebtedness.

No question of estoppel or ratification is involved for the reason that it appears defendant had no knowledge or notice of the giving of the original note or any of the several notes given in renewal thereof. Nor does it appear that she had any vested interest in the policy of insurance issued upon the life of T. J. Daley. It does appear, however, that during the period extending from the time of the making and delivery of the note sued upon, T. J. Daley held a general power of attorney executed by defendant. This instrument reads:

"I, Sarah M. Daley, . . . do make, constitute and appoint T. J. Daley . . . my true and lawful attorney for me and in my name, place and stead, and for my use and benefit, to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, account, legacies, bequests, interests, divi-

dends, annuities and demands whatsoever, as are now or shall hereafter become due, owing, payable or belonging to me and have, use, and take all lawful ways and means in my name or otherwise for the recovery thereof by attachments, arrests, distress or otherwise, and to compromise and agree for the same and acquittances or other sufficient discharges for the same, for me and in my name, to make, seal and deliver, to bargain, contract, agree for, purchase, receive and take lands, tenements, hereditaments, and accept the seizen and possession of all lands, and all deeds and other assurances, in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate, lands, tenements and hereditaments, upon such terms and conditions and under such covenants as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in possession or in action, and to make, do and transact all and every kind of business of what nature and kind soever, and also for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidence of debt, releases and satisfaction of mortgage, judgments and other debts and such other instruments in writing of whatsoever kind and nature as may be necessary or proper in the premises."

Since, in the performance of all the acts specified, the power conferred is in express terms restricted to those acts only which were for defendant's "use and benefit," it is impossible in any event to perceive how she could be held liable in the absence of a showing of such fact. We cannot assume by reason of defendant being named as beneficiary in the policy, that she had a vested interest therein. Indeed, in the absence of a showing to the contrary (and there is none), we must, under the rule that every presumption is in favor of the regularity of the judgment, assume that the insured reserved the right of revocation and change as to the beneficiary so named. "Where a policy of life insurance reserves to the insured the right to change the beneficiary, upon written request therefor, the interest of the designated beneficiary

prior to the death of the insured is that of a mere expectancy of an incompleated gift, subject to revocation at the will of the insured." (*McEwen v. New York Life Ins. Co.*, 23 Cal. App. 694, [139 Pac. 242], and cases therein cited.) This being true, it cannot be said the giving of the note purporting to obligate defendant was for her use and benefit. Moreover, the rule is that formal instruments conferring authority to bind another must be construed strictly in accordance with the plain import of the language of the document, and its interpretation cannot be extended by implication so as to authorize acts beyond those specified, unless absolutely necessary to carry out the powers expressly delegated. (*Harris v. Johnston*, 54 Minn. 182, [40 Am. St. Rep. 312, 55 N. W. 970]; *Johnson v. Wright*, 6 Cal. 373; *Golinsky v. Allison*, 114 Cal. 458, [46 Pac. 295]; *Penfold v. Warner*, 96 Mich. 179, [35 Am. St. Rep. 591, 55 N. W. 680]; *Skirvin v. O'Brien*, 43 Tex. Civ. App. 1, [95 S. W. 696].) Aside from the fact that the act of T. J. Daley in signing the note was not for the use and benefit of defendant, it clearly appears from an examination of the instrument that it did not purport to confer upon him, as such attorney in fact, power to execute in defendant's name the note to plaintiff in payment of the premium due upon a policy of insurance issued upon the life of Daley.

The record discloses the grounds upon which the motion for nonsuit was based, and since the motion was properly granted, findings of fact were unnecessary. (*Toulouse v. Pare*, 103 Cal. 251, [37 Pac. 146]; *Reynolds v. Brumagim*, 54 Cal. 254.)

Judgment affirmed.

Conrey, P. J., and James, J., concurred

A petition for a rehearing of this cause was denied by the district court of appeal on October 5, 1914.

[Civ. No. 1507. Second Appellate District.—September 8, 1914.]

FRED T. HARRIS, Respondent, v. JOSEPH BUCHER, Appellant.

ARCHITECT—ACTION FOR SERVICES—COMPLIANCE WITH STATUTE REGULATING PRACTICE OF ARCHITECTURE.—In an action brought by one practicing architecture to recover for services rendered, it is not necessary to allege and prove compliance by him with the act (Stats. 1901, p. 641) regulating the practice of architecture and thereby show that he is not guilty of a misdemeanor, but noncompliance with the statute is a matter of defense to be pleaded and proved by the defendant.

APPEAL from a judgment of the Superior Court of San Bernardino County. Benjamin F. Bledsoe, Judge.

The facts are stated in the opinion of the court.

Ralph E. Swing, for Appellant.

Curtis & McNabb, for Respondent.

SHAW, J.—Action to recover a balance alleged to be due from defendant to plaintiff upon an express contract for services rendered by the latter in preparing plans and specifications for and superintending the construction of a building. Judgment went for plaintiff, from which defendant appeals upon a bill of exceptions.

The services rendered pursuant to the contract, as shown by the complaint, were those of an architect. Section 5 of "An act to regulate the practice of architecture," approved March 23, 1901 (Stats. 1901, p. 641), provides that ". . . it shall be unlawful, and it shall be a misdemeanor, . . . for any person to practice architecture without a certificate in this state, or to advertise, or put out any sign or card, or other device which might indicate to the public that he was an architect; provided that nothing in this act shall prevent any person from making plans for his own buildings, nor furnishing plans or other data for buildings of other persons, provided the person so furnishing such plans or data shall fully inform the person for whom such plans or data are furnished, that

he, the person furnishing such plans, is not a certified architect."

The complaint, as to which no attack was made in the court below, did not allege any facts showing compliance on the part of plaintiff with the provisions of said statute; nor did the answer contain any allegations negating such compliance on his part. In the absence of such issue being tendered by the pleadings, no evidence was offered touching the question. Appellant for the first time and in this court now insists that, in the absence of allegations bringing plaintiff within the terms of said provision of law, the complaint fails to state a cause of action. Whether it was necessary to allege and prove that plaintiff was a duly certified architect is the point decisive of the appeal.

While it is generally conceded that noncompliance with such provisions of law will be a bar to recovery for services rendered (*Gardner v. Tatum*, 81 Cal. 370, [22 Pac. 880]), there seems to be a conflict of authority as to whether plaintiff must allege and, if denied, prove his compliance with the law, or whether the burden rests upon defendant as a matter of defense to show plaintiff's neglect and failure to comply therewith. Appellant insists the burden rests upon plaintiff, who, in the absence of such fact being established, is not entitled to recover. In support of such contention he cites a number of cases, some of which fully support his position. (See *Wooley v. Bell*, 33 Tex. Civ. App. 399, [76 S. W. 797]; *Bower v. Smith*, 8 Ga. 74; *Murray v. Williams*, 121 Ga. 63, [48 S. E. 686]; *Cooper v. Griffin*, 13 Ind. App. 212, [40 N. E. 710]; *Westbrook v. Nelson*, 64 Kan. 436, [67 Pac. 884]; *Lanzer v. Unterberg*, 9 Misc. Rep. 210, [29 N. Y. Supp. 683].) These cases, where directly in point, proceed upon the theory that since the statute makes it a misdemeanor to practice the calling without first procuring the required license or certificate, it devolves upon plaintiff to show, before he can recover, that he has complied with the provisions thereof. In some of them, however, the facts are distinguishable from those in the case at bar in that the statute in express terms prohibited any recovery unless the required certificate had been obtained. While in this case the statute makes it unlawful to practice architecture without a certificate, it does not in terms require the issuance thereof as a condition of recovery. Since the statute declares the practice of architecture without

the issuance of the required certificate to be a misdemeanor, we must, in order to sustain appellant's contention, assume that plaintiff is guilty of the commission of a crime. On the contrary, we are of the opinion that a presumption of innocence arises; hence, where noncompliance with the statute would constitute a criminal offense, we must, unless the contrary be shown, indulge in the presumption that plaintiff has complied therewith. In the case of *Chicago v. Wood*, 24 Ill. App. 40, the court, in discussing a like question, said: "The reason why the license will be presumed where there is no evidence to the contrary, rests upon the principle that when an act is required, by positive law, to be done, the omission of which would be a misdemeanor, the law presumes that it has been done and therefore the party relying on the omission must make some proof of it, though it be a negative." To the same effect is: *Williams v. People*, 20 Ill. App. 92; *McPherson v. Cheadell*, 24 Wend. (N. Y.) 15; *Jo Daviess County v. Staples*, 108 Ill. App. 539; *Lacy v. Kossuth County*, 106 Iowa, 16, [75 N. W. 689]; *Lyford v. Martin*, 79 Minn. 243, [82 N. W. 479]; *Webster v. Lamb*, 15 S. D. 292, [89 N. W. 473]; *Acme Mercantile Agency v. Rockford*, 10 S. D. 203, [66 Am. St. Rep. 714, 72 N. W. 466]. The statute does not make the obtaining of the certificate a condition precedent to the right of recovery, and we cannot assent to the proposition that in order to maintain the action plaintiff must first allege and prove that he is not guilty of the commission of a crime. We are therefore of the opinion that in an action brought by one practicing architecture to recover for services rendered, it is not necessary to allege and prove compliance with the act regulating the practice of architecture, but that noncompliance therewith is a matter of defense to be pleaded and proved by defendant in the action.

Appellant also insists that the action was prematurely brought. No such issue was raised by the pleadings, nor can we say, upon the vague and uncertain testimony of defendant, that there was any proof justifying the contention. The point is without merit.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 7, 1914.

[Civ. No. 1495. Second Appellate District.—September 8, 1914.]

C. E. A. BRUNSON, Appellant, v. THE CITY OF SANTA MONICA (a Municipal Corporation), Respondent.

APPEAL—ORDER SUSTAINING DEMURRER NOT APPEALABLE—DISMISSAL OF APPEAL.—No appeal lies from an order sustaining a demurrer without leave to amend, and if such appeal is attempted, it will be dismissed.

ID.—ORDER SUSTAINING DEMURRER—HOW REVIEWABLE.—The only method of review in such case is through an appeal from the final judgment, if unfavorable, thereafter entered in the action itself.

APPEAL from an order of the Superior Court of Los Angeles County sustaining a demurrer. Chas. Wellborn, Judge.

The facts are stated in the opinion of the court.

E. Burton Ceruti, for Appellant.

Hutton, Jensen & Fogel, for Respondent.

SHAW, J.—The appeal is from “the whole of that certain order made and entered in this action by said court on the twenty-ninth day of December, 1913, sustaining the defendant’s demurrer to plaintiff’s amended complaint on file herein, without leave to amend.” No appeal lies from an order sustaining a demurrer without leave to amend. (Code Civ. Proc., sec. 963.) “The only method of review of such proceedings here is through an appeal from the final judgment thereafter entered in the action itself, if such judgment be unfavorable.” (*Ashley v. Olmsted*, 54 Cal. 616; *Agard v. Valencia*, 39 Cal. 292; *Hibberd v. Smith*, 39 Cal. 145.) The record discloses no judgment entered in the action from which an appeal could be prosecuted.

The appeal purporting to have been taken from the order sustaining the demurrer is dismissed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1575. Second Appellate District.—September 8, 1914.]

CHARLES O. NOURSE, Appellant, v. CITY OF LOS ANGELES (a Municipal Corporation), et al., Respondents.

MUNICIPAL CORPORATION—OPERATION OF WATER SYSTEM—PROPRIETARY OR SOVEREIGN CAPACITY.—Where a municipal corporation assumes, under its charter, the duty of operating a water system for the purpose of supplying its inhabitants with water, it acts, not in its sovereign capacity, but in the capacity of a private corporation engaged in like business.

ID.—SUPPLY OF WATER—DUTY TO FURNISH WITHOUT DISCRIMINATION.—In such case it is the duty of the city, like a private corporation, to furnish without discrimination to all its inhabitants who apply therefor a supply of water upon their compliance with such reasonable rules and regulations as it may lawfully establish for the conduct of the business.

ID.—RULES AND REGULATIONS—PAYMENT OF ARREARAGE OF FORMER OCCUPANT AS CONDITION PRECEDENT TO FURNISHING WATER.—A rule adopted by the city that all water rates shall be charged against the property on which it is furnished, and against the owner thereof, and in case of delinquency the water shall be cut off and not turned on until the payment of the delinquency, irrespective of any change in the ownership or occupancy of the property, is unreasonable and discriminatory as against an occupant of property whose predecessors are in default but who has himself complied with all the regulations established as conditions precedent to the furnishing of water; there being no statute or charter provision conferring authority on the city to adopt such a regulation.

ID.—MANDAMUS—WHEN LIES TO COMPEL CITY TO FURNISH WATER.—In such circumstances the applicant for water is entitled to a peremptory writ of *mandamus* to compel the city to supply him.

APPEAL from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge.

The facts are stated in the opinion of the court.

Paul Nourse, and John Beman, for Appellant.

Albert Lee Stephens, City Attorney, and Charles S. Bunnell, Assistant City Attorney, for Respondents.

SHAW, J.—This is an appeal from a judgment of the trial court denying an application for a peremptory writ of man-

date commanding the board of public service commissioners of the city of Los Angeles to furnish petitioner a supply of water for use at the premises designated as No. 147 West Avenue 31 in the city of Los Angeles.

At all the times in question the city of Los Angeles owned and operated a water system by means of which water was supplied to said city and its inhabitants, and with the pipes and mains of which system the said premises of petitioner were connected. Among other rules and regulations established by ordinance for the supplying of water to the inhabitants of the city, was a provision as follows:

"All water rates shall be charged against the property on which it is furnished, and against the owner thereof, and if for any cause any sums owing therefor become delinquent, the water shall be cut off, and in no case shall it be turned on to the same property until all such delinquencies shall have been paid in full. No change of ownership or occupation shall affect the application of this section."

On October 27, 1913, petitioner made demand upon respondents for a supply of water for use upon said premises, to be delivered through the pipes connecting same with the said water system, and in making the demand he complied with all the rules and regulations established therefor, save and except that he refused to pay respondents the sum of \$1.50, conceded to be due for water theretofore supplied for use upon said premises by a former occupant thereof. The sole question here involved is the validity of the provision above set forth by reason of which respondents seek to exact payment of this arrearage due for water used upon the premises by the former occupant thereof as a condition of furnishing petitioner the supply of water so demanded.

Under its charter the city has assumed the duty of operating a water system for the purpose of supplying water to its inhabitants. In the performance of this duty it acts, not in its sovereign capacity, but in the capacity of a private corporation engaged in like business. (*Appeal of Brumm*, (Pa.) 12 Atl. 855; *Linne v. Bredes*, 43 Wash. 540, [117 Am. St. Rep. 1068, 6 L. R. A. (N. S.) 707, 86 Pac. 858]; 1 Wyman on Public Service Corporations, p. 187.) Like a private corporation, it is the duty of the city to furnish without discrimination to all its inhabitants who apply therefor a supply of water upon such applicants complying with such reasonable

rules and regulations as it may lawfully establish for the conduct of the business. The question is whether or not the provision upon the authority of which respondents base their refusal to supply the water is, in the absence of any statute authorizing the same, a reasonable regulation. Respondents have directed our attention to a number of cases wherein provisions similar to the one under discussion have been upheld. From an examination thereof it appears that in all the cases cited there existed a statute upon the authority of which the provision was enacted. (See *Howe v. City of Orange*, 70 N. J. Eq. 648, [62 Atl. 777]; *Appeal of Brumm*, (Pa.) [12 Atl. 855]; *City of Atlanta v. Burton*, 90 Ga. 486, [16 S. E. 214].) Where such right is conferred by statute or the organic law of the city, it can of course be asserted and enforced by ordinance embodying such rules and regulations. The city charter contains nothing touching the subject, and the general statutes of the state are silent in conferring such power. This being the case, the authority to enact the provision under discussion, if it exists at all, is by virtue of the general incidental power of the municipality. The provisions of ordinances enacted under such implied power must be reasonably necessary to carry out the express powers conferred and not inconsistent with the laws or policy of the state. (*Ex parte Green*, 94 Cal. 387, [29 Pac. 783]; *Egan v. City of San Francisco*, 165 Cal. 576, [133 Pac. 294].) The ordinance fixing the rules and regulations provides that "all rates, except meter rates, are due and payable in advance, and meter rates are due and payable at the end of the month, excepting that a deposit may be required thereon in an amount not exceeding the estimated quantity of water consumed." It appears the water was supplied to the former occupant of the premises in question by meter, and therefore the rates were not due until the expiration of the month. But under the provision just quoted the city could have exacted a deposit in an amount equal to the estimated value of the quantity of water to be supplied, thus fully protecting itself against loss. It is therefore an unnecessary regulation and as applied to petitioner, unreasonable in that, while he is not in arrears for any water furnished to him or supplied to another upon his order, it is nevertheless insisted that he pay the debt of another as a prerequisite condition to the city performing its duty to supply water to all its inhabitants without dis-

crimination, and for a like reason is discriminatory against petitioner. While respondents do not seek directly to enforce payment of the charge against the property, they do, in withholding a legal right and by thus destroying the use of the property as a habitation, indirectly seek to compel petitioner to pay such charge. In addition to the authorities cited by respondents wherein the validity of the provision here attacked was upheld by reason of statutory authority, they have cited the cases of *Jones v. Mayor*, 109 Tenn. 550, [72 S. W. 985], and *Sheward v. Citizens' Water Co.*, 90 Cal. 635, [27 Pac. 439]. These cases are clearly distinguished from that at bar by reason of the fact that the applicant for water was himself in arrears and had made default in payment for water which had been theretofore supplied to him. Our conclusion is that the regulation in question is unreasonable in that, without statutory authority therefor, it makes one person liable for the debts of another and contravenes the duty assumed by the city to serve all its inhabitants without discrimination. This view is sustained by overwhelming authority. (See *Chicago v. Northwestern Mut. Life Ins. Co.*, 218 Ill. 40, [1 L. R. A. (N. S.) 770, 75 N. E. 803]; *Turner v. Revere Water Co.*, 171 Mass. 329, [68 Am. St. Rep. 432, 40 L. R. A. 657, 50 N. E. 634]; *Linne v. Bredes*, 43 Wash. 540, [117 Am. St. Rep. 1068, 6 L. R. A. (N. S.) 707, 86 Pac. 858]; *City of Houston v. Lockwood Inv. Co.*, (Tex. Civ. App.) 144 S. W. 685; *Harbison v. Knoxville Water Co.*, (Tenn.) 53 S. W. 995.)

The judgment is reversed and the trial court instructed to render judgment awarding petitioner a peremptory writ of mandate as prayed for.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 7, 1914.

[Crim. No. 253. Third Appellate District.—September 10, 1914.]

THE PEOPLE, Respondent, v. RICHARD FORD, Appellant.

CRIMINAL LAW—HOMICIDE—CHANGE OF VENUE—ESSENTIALS OF AFFIDAVIT.—The affidavit in support of an application for a change of venue in a homicide case, on the ground of local prejudice and bias of the judge, should not stop with stating conclusions; it must state facts, and the facts stated must be sufficient to convince a reasonable mind that the opinion of the affiant is well founded.

Id.—AFFIDAVIT FOR CHANGE OF VENUE—WHEN INSUFFICIENT.—An affidavit in a homicide case which merely alleges that friendly relations existed between the judge and the deceased, that the latter was a popular public officer, that the mind of the public is inflamed against the defendant, and that the person in relation to whose property and affairs the homicide occurred is a wealthy and widely known landowner, without setting forth more facts showing bias and prejudice calculated to interfere with a fair trial, is insufficient to sustain an application for a change of venue.

Id.—HOMICIDE—INDICTMENT IN LANGUAGE OF STATUTE—PROOF OF CONSPIRACY.—Where an indictment charges several persons with murder in the language of the statute, evidence is admissible to show a conspiracy between them, it appearing that the homicide was committed while they were engaged in the commission of an unlawful act. Proof of the conspiracy is not made to establish another and distinct crime—that is, conspiracy as such—but to show the circumstances under which the homicide was committed and that the acts were unlawful in the commission of which the killing resulted.

Id.—CONSPIRACY RESULTING IN HOMICIDE—PRINCIPALS AND ACCESSORIES. Where one person unites with one or more other persons in an enterprise to commit an unlawful act, whether a felony or misdemeanor, with the intention to withstand all opposition by force, and is present aiding and abetting the deed, and murder is committed by some one of the party in pursuance of the original design, or the unlawful act results in death, he is guilty as the principal or immediate offender.

Id.—RESPONSIBILITY OF CONSPIRATORS—ACT NOT ORIGINALLY INTENDED. In such case each conspirator is responsible criminally for the acts of the others, done in furtherance of the common design, although such acts were not intended as part of the original plan.

Id.—RESISTING ARREST BY STRIKING LABOR LEADER—INCITING OTHERS TO ASSIST—HOMICIDE BY CONSPIRATORS.—If it is shown in a prosecution for homicide that the defendant, as the leader of a large number of striking hop pickers, unlawfully resisted arrest, and, by

inciting those under his leadership to assist him in such unlawful act, a homicide resulted through the act of one or more of them, the jury may properly be instructed that where several persons conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates, committed in furtherance of any prosecution of the common design for which they combine.

ID.—LAWFULNESS OF STRIKE—REFUSAL TO INSTRUCT JURY REGARDING.

In such prosecution the court properly refuses to instruct the jury on the lawfulness of striking, picketing, and boycotting, when the evidence does not show that the conspirators were engaged in such acts when the homicide occurred, although the officers who were killed might not have been present had it not been for a strike.

ID.—FELONIES OR MISDEMEANORS—NO DISTINCTION BETWEEN CONSPIRACIES TO COMMIT.

The law makes no distinction between conspiracies to commit misdemeanors and conspiracies to commit felonies, and a homicide perpetrated in furtherance of a conspiracy to commit a breach of the peace, or to resist an officer in the discharge of his official duty, is murder as well as a homicide committed in furtherance of a conspiracy to commit a felony.

ID.—HOMICIDE—IMPLIED MALICE—ABSENCE OF CONSIDERATION OF PROVOCATION.

Any unlawful killing of a human being, with malice aforethought, express or implied, is murder. Malice is implied when no considerable provocation appears.

ID.—GUILT OF ACCUSED AS PRINCIPAL—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.

In this prosecution of the leader of striking laborers for murder in resisting arrest, the jury is justified from the evidence in finding him guilty as a principal although he did not himself fire the fatal shot.

ID.—EVIDENCE—DISTINCTION BETWEEN CONFESSIONS AND ADMISSIONS.

A distinction exists, in legal contemplation, between admissions and confessions; a confession in criminal law is the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the same. It is restricted to acknowledgment of guilt.

ID.—ADMISSIBILITY OF ADMISSION—TENDENCY TO ESTABLISH GUILT—

PRELIMINARY PROOF.—An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence, without preliminary proof, merely because it may, when considered with other facts, tend to establish guilt.

ID.—DECLARATIONS OF ACCUSED—EFFECT OF DURESS.

Declarations of a person accused of crime, which are not confessions of guilt, cannot be objected to as obtained under duress.

ID.—CONFESSIONS—CAUTION IN ADMITTING—WEIGHT AS EVIDENCE.

While confessions are to be received with caution, yet when the admission is deliberately made and precisely identified, the evidence it affords is of the most satisfactory nature.

ID.—CONFESSION—CORROBORATION—PROOFS OF CORPUS DELICTI.—Where the *corpus delicti* is otherwise satisfactorily proved, a defendant may be convicted on his uncorroborated confession; proof of the *corpus delicti* may be considered as a circumstance sufficiently corroborating a confession.

ID.—DOCTRINE OF REASONABLE DOUBT—INSTRUCTION TO JURY.—A suggestion to the jury, in giving an approved instruction upon the doctrine of reasonable doubt, that the term "reasonable doubt" is "probably pretty well understood but not easily defined," is unnecessary but harmless.

ID.—INSTRUCTION ON REASONABLE DOUBT—HARMLESS OMISSION.—The omission to state, at the end of an instruction on the question of reasonable doubt, that the jury may not convict unless the evidence convinces them beyond a reasonable doubt, is not prejudicial error if this admonition occurs frequently in other instructions.

ID.—WITNESS FALSE IN PART—INSTRUCTIONS.—An instruction to the jury that "you have a right to disregard entirely the testimony of any witness whom you believe to have willfully testified falsely," is properly refused, as failing to use the necessary qualifying words "in a material matter," especially if the court elsewhere instructs the jury that "a witness willfully false in one part of his testimony is to be distrusted in others."

APPEAL from a judgment of the Superior Court of Yuba County and from an order refusing a new trial. Eugene P. McDaniel, Judge.

The facts are stated in the opinion of the court.

R. M. Royce, and Austin Lewis, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

THE COURT.—An indictment was returned, September 8, 1913, against the defendant for the murder of E. T. Manwell on the third day of August, 1913, at the county of Yuba. On October 30, 1913, H. D. Suhr was indicted and, still later, November 4, 1913, William Beck and Harry Bagan were jointly indicted, all for the same crime. By stipulation all the defendants were tried jointly. Beck and Bagan were acquitted and Ford and Suhr were convicted of murder in the second degree and each was sentenced to imprisonment for life in the state's prison. The record in case No. 253 presents the appeal of defendant Ford from the judgment of conviction

and from the order denying his motion for a new trial. By stipulation the appeal of defendant Suhr, No. 254, is to be heard upon the transcript brought up in No. 253.

1. On November 28, 1913, defendant Ford made a motion "for an order transferring this cause to some convenient county for trial and that some judge other than the Honorable Eugene P. McDaniel hear the same." The ground of the motion was that the defendant cannot have a fair trial in Yuba County "by reason of the bias and prejudice and high feeling against the said defendant, and that the said judge by reason of bias and prejudice is disqualified from hearing said cause. Said motion will be based upon the affidavit of said defendant Richard Ford." A like motion was made on behalf of defendant Suhr supported by his affidavit alleging substantially the same facts as were set forth by defendant Ford and both motions were heard at the same time. On behalf of the people counter affidavits of E. B. Stanwood, district attorney, and Eugene P. McDaniel, judge of the superior court of Yuba County, were read in resistance of the motion. Both motions were denied.

The affidavit of Ford states that Manwell, district attorney, and one Reardon, deputy sheriff of Yuba County, died of gunshot wounds; that Sheriff Voss, a deputy sheriff, and Constable Anderson were beaten and injured; that two of the hop-pickers were killed and the arm of a man by the name of Nielsen was shot off by deputy sheriff Daken; that Manwell was widely and favorably known in the county and was a personal friend of Judge McDaniel; that district attorney Stanwood was a personal friend of Manwell and was his assistant district attorney and the present district attorney is a son of Manwell; that said sheriff and Daken and Anderson were very popular in the county; that, on August 2, 1913, the employees on the Durst hop-ranch, near Wheatland, some twenty-three hundred in number, had protested against the unsanitary and intolerable conditions of the camp, specifying the particulars as to such conditions; that Ford was selected by the hop-pickers as spokesman to present their grievances and, at about 5 o'clock on Sunday, August 3, 1913, said employees were holding a peaceful meeting on said ranch and said sheriff, Anderson, Armstead, Reardon, and others, with Manwell, some of whom were armed, entered said assemblage; that a disturbance ensued and as to the fatal results and the

responsibility therefor, the facts are in dispute; that Durst is a large landowner, rich and widely known; that later eight persons were arrested at Wheatland and were taken to Marysville by the state militia, "to prevent being lynched by the people of Yuba County and the people of Yuba County are biased and prejudiced against said defendant"; that district attorney Stanwood has arrested many persons "without bringing them before a magistrate for periods running from thirty days to three months with the approval of the community" and that detectives were employed who made efforts to compel said persons so arrested "to swear to facts tending to convict some one of murder"; that the issues of fact at the trial of defendant involve the general condition of labor on ranches in the county and the veracity of said Durst and said sheriff and constables and other officers and their acts are involved in the case; that said Stanwood is widely known in said county and has many personal friends and the propriety of his conduct and his fitness for his office are also issues in the case; "that Yuba County is a rural county and the people generally know one another and most of the people know all of the aforesaid parties" and are the friends of said parties; that the witnesses for the prosecution are many of them residents of said county and well and favorably known and this defendant and many of his witnesses are strangers in said county and unknown and "some of defendant's witnesses are afraid to come to Marysville to testify in defendant's behalf."

District Attorney Stanwood made affidavit: That he is well acquainted throughout the county and with the people thereof; that since said August 3, 1913, he has had charge of the prosecution of defendant, has interviewed witnesses and conducted the investigation up to the present time; that affiant has tried many of the criminal cases and mingled largely with the people of said county "and at no time has affiant discovered or learned of any sentiment or prejudice among the people of Yuba County against any defendant" and affiant, on information and belief, "alleges the fact to be that there is in Yuba County, and among the people thereof, no prejudice or bias against said defendant whatsoever" and defendant "can have in said county, before any jury that may be selected, an absolutely fair and impartial trial"; that there is and was nothing in the relationship between affiant and said Manwell or that existing with his son, or any other reason or cause

"which has biased or prejudiced this affiant against defendant, nor does this affiant at this time entertain the slightest bias or prejudice against him"; that nothing in affiant's friendship for Sheriff Voss in any way affects affiant to defendant's prejudice and affiant says that he is informed and believes that said Sheriff Voss at no time has entertained any bias or prejudice against defendant and it is a fact that said sheriff and said deputies referred to in defendant's affidavit are well and favorably known in the county, "but there is nothing in said acquaintanceship or knowledge which in any way has biased or will bias or prejudice any of the people of said county against defendant upon his trial in the above-entitled action or in any way at all"; that two companies of militia were, shortly after August 3, 1913, "called to the scene of the killing for the purpose of restoring peace and order thereat and for no other purpose; that eight or more persons arrested at said time were escorted to Marysville by certain members of the militia solely for the reason that there did not happen to be at hand sufficient peace officers for that purpose; that, however, they were not so escorted for the purpose of protecting them from violence; and as a matter of fact, there was no manifestation of any ill-feeling or violence against any of said persons or against any person, at or after the killing of said Manwell and Reardon, by any of the people of said Yuba County; that affiant "has caused several persons to be arrested and confined for a certain time and thereafter has caused several persons thus arrested to be released after a full and fair investigation"; that certain detectives were employed but at no time did affiant "do or advise the doing of any act or acts except as were entirely necessary, legal and proper in the premises"; affiant denies that the issues of fact at the trial can be made to involve any general or other condition of labor on the ranches of Yuba County and he denies that the involving of such conditions would in any way tend to prejudice any of the people of Yuba County against the defendant; that affiant has known Judge McDaniel intimately for twenty years and, since said August 3, 1913, "he has frequently heard said judge make expressions concerning matters involved, and which necessarily will become involved upon the trial of said action; that at no time has he heard said judge express any sentiments, directly or indirectly tending to show the existence in his mind of the slightest bias or

prejudice against the above named defendant or his case . . . and affiant alleges that said judge is in no way biased or prejudiced against said defendant, and defendant can have before him an absolutely fair and impartial trial."

Judge McDaniel made affidavit: That Manwell was personally known to and a friend of affiant; that nothing in the acquaintance of affiant with Manwell "in any way affects affiant as such judge and the same in no way produces in the mind of affiant any prejudice toward the defendant in this action; affiant, as such judge, can sit and preside upon the trial of this action as fairly and as unbiased as he could in any criminal action whatsoever; . . . affiant has at no time had, nor has he now, any bias or prejudice against defendant either resulting from affiant's friendship for said Manwell or from his sharing in any general sentiment of the community in said Yuba County, or for any reason or in any way at all; affiant has no knowledge at this time of the existence of any prejudice or feeling among the people or the community in said Yuba County, against defendant"; that nothing in affiant's acquaintance with and friendship for Sheriff Voss can in any way affect affiant as a judge or will have any bearing on his actions in said case or in any way cause any prejudice or bias in the mind of affiant against defendant; that he has read the affidavit of defendant and that "neither from any matters in said affidavit set out nor for any cause or reason whatsoever does he entertain any bias or prejudice whatsoever against the defendant."

There is much in Ford's affidavit concerning the intimate and friendly relations existing between the district attorney and the judge and the parties named that might be said in almost any criminal case arising in the county. The popularity of an official can hardly be taken as evidence, certainly not as conclusive, that a fair and impartial trial could not be given a defendant who had assaulted or even killed such official. Ordinarily where there is an existing highly inflamed condition of the public mind prejudicial to a person charged with crime, it finds some manifestation through the public press, or by assemblages of the people in the neighborhood of the scene of the crime, and, if general, in other parts of the county. We have here no evidence that the people of Yuba County had, even to a limited extent, shown any feeling of passion or prejudice toward Ford or any of the defendants.

or had manifested any disposition to prejudice the merits of the case. Ford's statement that such was the condition of the public mind toward him is but his conclusion which is expressly denied by the counter affidavits. In *People v. Lindley*, 132 Cal. 304, [64 Pac. 472], the court said: "It is not sufficient, in a case of this kind, to allege in the affidavit simply that the defendant 'believes that he cannot have a fair and impartial trial,' etc., but it must be made to appear by the affidavit or affidavits on file that a fair and impartial trial cannot be had before the judge about to try the case, by reason of the bias and prejudice of such judge. (Code Civ. Proc., sec. 170, subd. 4.) The affidavit or affidavits must not only state facts, but the facts stated must establish to the satisfaction of a reasonable mind that the judge has a bias or prejudice that will in all probability prevent him from dealing fairly with the defendant." The same is true in respect of alleged bias and prejudice of the people at large. Some facts should appear which would convince a reasonable mind that the opinion of the affiant is well founded.

A jury was obtained, apparently, without any great delay or difficulty and defendant did not exercise all the peremptory challenges to which he was entitled.

The statement that the case involved the general condition of farm labor and wages in the county carries with it no inference that the subject will in any way cloud the real issues in the case or be likely to prejudice farmers, should any of that class be chosen as jurymen, against the defendant. Besides, the counter affidavits deny that any such issue would be involved and we cannot see that it could have been, as in fact it was not. Nor can we attach significance to the statement that Mr. Durst "is a large landowner, and a very rich man and widely known in Yuba County." There is no showing that his wealth or that the knowledge of the people of the county had of him could in any way have interfered with defendant's having a fair and impartial trial.

Without noticing in further detail the averments of Ford's affidavit, we think such of them as have any essential bearing upon his claim that he could not have a fair and impartial trial in Yuba County or before Judge McDaniel, are substantially controverted in the counter affidavits. The facts presented in a similar motion, in *People v. Susser*, 132 Cal. 631, [64 Pac. 1095], were so very different from the facts here

shown as to make that case of little value in the determination of the present question. We think the order denying the motion for a change of the place of trial was rightly made.

2. Some questions are discussed in appellant's brief that may be disposed of before reaching the more important contention—that the evidence is insufficient to justify the verdict. For a proper understanding of defendant's points now to be noticed, it may be stated that there was no evidence that Ford fired the shot which resulted in Manwell's death, although the confession of Suhr might give rise to an inference that he may have done so. The contention of defendant is thus stated:

"As it is admitted that neither Ford nor Suhr fired the fatal shot" (we find no such admission as to Suhr), "it was very important to correctly charge as to the illegality of the acts or words from which it was sought to hold them guilty of Manwell's death. The acts and words we submit should have been pleaded. The question as to their illegality was one of law for the court. The issue of fact was, were the acts done or words spoken, and what was their effect or result?" As we understand defendant's position, it is that defendant was at most engaged in conducting a strike, which was not an unlawful act, or that if he was committing a trespass it was but a misdemeanor; that whatever his acts or his words spoken which may have led to the killing they should have been alleged and, as his acts and words concerned only an undertaking not unlawful, or if unlawful, was but a misdemeanor, the killing as matter of law must be held not to have been murder in either degree; that unless defendant's acts and words constituted a felony he could not be held for murder because they resulted in the death of some one and at most his offense would be manslaughter because lacking the essential elements of murder. It is hence contended: 1. That evidence of a conspiracy was not admissible and cannot be considered because the conspiracy was not pleaded; and, 2. That evidence which fell short of showing a conspiracy to commit a felony would not support the verdict. We confess to some difficulty in discovering precisely defendant's contention but have given it as we understand it. The indictment was for murder and was charged in the language of the statute. We entertain no doubt as to the admissibility of evidence of a conspiracy under such an indictment where the murder was committed while the conspirators were engaged in the

consummation of some other unlawful act. Proof of the conspiracy is not made to establish another and distinct crime—that is, conspiracy as such—but to show the circumstances under which the homicide was committed and that the acts were unlawful in the commission of which the killing resulted. *People v. Brown*, 59 Cal. 345, and *People v. Kauffman*, 152 Cal. 331, [92 Pac. 861], were cases (many others might be cited) where the charge was murder and evidence was taken of a conspiracy to do an unlawful act. Upon the question of the responsibility for the acts of the conspirators we conceive the law to be—that where one person unites with one or more other persons in an enterprise to commit an unlawful act, whether a felony or misdemeanor, with the intention to withstand all opposition by force, and is present aiding and abetting the deed, and murder is committed by some one of the party in pursuance of the original design, or the unlawful act results in death, he is guilty as the principal or immediate offender. (*State v. Nash*, 7 Iowa, 347, 350; *Spies v. People*, 122 Ill. 1, [3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898].) In the *Spies* case it was said, at page 177 (of 122 Ill.): “Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design, a murder is committed, all of the company are equally principals in the murder though at the time of the act some of them were at such a distance as to be out of view, if the murder be in furtherance of the common design.” At page 225 (of 122 Ill.) it was said: “A man may be guilty of a wrong which he did not specifically intend, if it came naturally, or even accidentally from some specific or general evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one proceeding according to the common plan terminates in a criminal result, though not the particular result meant, all are liable.” And again: “There might be no special malice against the party slain nor deliberate intention to hurt him; but if the act was committed in prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who gave the blow. Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any conspirator in the accomplishment of the purpose in which they

are all at the time engaged." And it was held, in *Ruloff v. People*, 45 N. Y. 213, 217: "This general resolution of the confederates need not be proved by direct evidence. It may be inferred from circumstances, by the number, aims and behavior of the parties at or before the scene of action." (See *People v. Donnelly*, 143 Cal. 394, [77 Pac. 177].)

The principle governing conspiracies is well stated in *People v. Brown*, 59 Cal. 345, 352, and, although the conspiracy there was to commit a felony, we do not think that the grade of the crime involved in the conspiracy is material if the act or design is unlawful. It was said, in *People v. Kauffman*, 152 Cal. 331, 335, [92 Pac. 861, 862]: "But whether or not the act committed was the ordinary and probable effect of the common design or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury (citing cases), and if there be evidence to support the finding of the jury on this question its determination is conclusive."

It was not the theory of the prosecution, as claimed by defendant, "that every labor leader is responsible for all the acts of striking workmen, and that each labor leader can be tried under an indictment baldly stating that the said labor leader has personally done a specific thing, in this case murder, whereas, in fact, it is sought to hold him responsible for the act of another." The theory of the prosecution was that Ford, as the leader in this instance, was engaged in the unlawful act of resisting arrest by a peace officer armed with a lawful warrant and that by his words and acts he incited the persons then under his leadership to aid and assist him in such unlawful act and that Manwell met his death through the act of one or more of these conspirators thereunto induced by Ford. Appellant cites subdivision 2, section 192 of the Penal Code and *People v. Munn*, 65 Cal. 215, [3 Pac. 653], to show that instruction numbered 48, presently to be noticed, was incorrect, and to establish the proposition that the killing of Manwell was, at most, but manslaughter. The section of the code defines involuntary manslaughter to be—"in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." In the *Munn* case "the defendant was con-

victed of the crime of murder of the second degree. The evidence showed that he struck the deceased two or three blows with his fist, from which death ensued. It was not shown that he intended to kill deceased, but the court instructed the jury that he was liable for all *possible* consequences of his act. *Held*, error. (Syllabus.) In that case the court quoted the language of Chief Justice Shaw, in *Commonwealth v. Webster*, 5 Cush. (Mass.) 305, [52 Am. Dec. 711], as follows: "This rule is founded on the plain and obvious principle that a person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own act." The instruction given by the trial court stated the rule correctly to a certain point but added that if the act intended was unlawful the defendant would be responsible "for all the consequences, even the *possible* consequences." The instruction (numbered 48) given in the present case was as follows: "I instruct you that where several persons conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan."

This instruction is taken from a statement of "the rules of law governing the criminal liability of each of several parties engaging in an unlawful conspiracy or combination," said by the supreme court, in *People v. Kauffman*, 152 Cal. 331, 334, [92 Pac. 861, 862], to be "an apt statement of them (the rules), abundantly supported by authority," and found in 8 Cyc. 641. Appellant replies that in the *Kauffman* case the conspiracy was to commit a felony—robbery—and hence the case does not apply here. Appellant's error is in assuming that a distinction is made between conspiracies to commit misdemeanors and conspiracies to commit felonies. In short, his position is—that a homicide perpetrated in furtherance of a conspiracy to commit a felony is murder but that a homicide perpetrated in furtherance of a conspiracy to commit a breach of the peace, or to resist an officer in the dis-

charge of his official duty is nothing more than manslaughter. The law recognizes no such distinction. Sufficient of the evidence, tending to show that the unlawful act was in furtherance of which the murder was committed, will be hereafter stated. In this connection appellant complains of the refusal of the court to give the following instructions:

"I charge you as matter of law that a strike is lawful."

"I charge you as matter of law that a boycott is lawful."

"I charge you as matter of law that one or more men have a right to quit work for any reason, or no reason, or a frivolous reason, singly or in a body, and peaceably to picket, and peaceably to request or persuade others to do so, and to request others to assist them in so persuading and so picketing."

It is urged that under the instructions given the jury might have assumed that striking or picketing or boycotting was an unlawful act, and to prevent such assumption by the jury defendant was entitled to have the instructions given. There was no evidence that the killing occurred while the conspirators were in the act of striking, picketing, or boycotting. There was evidence that many of the hop-pickers quit work Sunday morning—on their part a strike; that a boycott was declared and was in operation early in the day against certain businesses being carried on in the camp—a store, a restaurant, a near-beer booth and a shooting gallery.

Manwell was killed at a meeting of hop-pickers held about five o'clock of that day under circumstances which will hereinafter be more fully set forth. Suffice it at this point to say that while it may be assumed that the hop-pickers were assembled at this meeting originally to consider or talk over their grievances, it soon, under the leadership of Ford, took on altogether a different complexion. He made it known to the people that the officers of the law were approaching with an intention to arrest him and he called upon his followers to stand by him and prevent his being taken. This they did promptly upon the coming of the officers into their midst and there quickly followed not only Manwell's death but other tragic and fatal happenings which showed that the sole purpose of the actors was to prevent Ford's arrest at all hazards. The tragedy may be said to have remotely had its origin in the strike—that is, if there had been no strike there might have been no officers there and no occasion for their being there. But so far as the strike and the occurrences of the earlier

part of the day are concerned they became collateral to the events happening at 5 o'clock and immaterial to the issue being tried. (See *People v. Conkling*, 111 Cal. 616, [44 Pac. 314].) The legal right of the parties to strike was not an issue and furnished no justification for killing Manwell in their effort to protect their leader, Ford, from arrest.

Appellant presents a still further phase of this contention. He says that the verdict acquitted him of murder in the first degree; that there is no evidence warranting a conviction of manslaughter and hence there remained only murder of the second degree of which he could have been convicted, but "that the only possible justification for a verdict of murder in the second degree would have been evidence that Manwell was killed in the perpetration or attempt to perpetrate some felony other than arson, rape, robbery, burglary or mayhem, but there is absolutely no evidence of any perpetration, or attempted perpetration of any felony whatsoever." The answer to this view of the law seems to be quite obvious. Murder in the first degree is specifically defined "and all other kinds of murders are of the second degree." (Pen. Code, sec. 189.) Manslaughter is not any kind of murder. So there must be murders which are not murders in the first degree. "Murder is the unlawful killing of a human being, with malice aforethought." (Pen. Code, sec. 187.) Any unlawful killing of a human being with malice aforethought is murder. The degree has nothing to do with the definition. But "such malice may be express or implied. . . . It is implied, when no considerable provocation appears." (Pen. Code, sec. 188.) If, then, the killing of Manwell was done in the absence of "considerable provocation," malice is implied and we have the very case provided for by the statute. It will be observed that the statute makes no distinction between cases where the killing was in the perpetration of a misdemeanor and of a felony; it says "all other kinds of murder are of the second degree"; that is, the unlawful killing of a human being with malice (express or implied) aforethought is murder, and the killing is equally unlawful whether done in the perpetration of a misdemeanor or felony.

3. It appears that, on Sunday, August 3, 1913, there were at the Durst ranch, near Wheatland, about two thousand or twenty-five hundred people, of several different nationalities, men, women, and children, gathered there to pick hops; the

hop-picking had begun about the middle of the preceding week; the unsanitary conditions surrounding these laborers, and some unnecessary hardships to which they were subjected in the performance of their work, naturally aroused a feeling among them of dissatisfaction which manifested itself first in an open manner at meetings on Saturday, August 2d. That the movement toward a strike had taken shape at that time is shown by certain telegrams sent by defendant Suhr, defendant Ford being with him. There were nine of these telegrams, each signed by Suhr, sent through the Western Union office at Wheatland during Sunday, August 3rd, the first, at 5:54 A. M., to T. W. O'Brien, 238 South California Street, Stockton, reading: "Strike on at Durst Bros. Twenty-five hundred out. Send literature at once. Notify Sacramento." He telegraphed "To Secy Local 73, 1117 3rd St., Sacramento Cal. Strike on at Durst twenty-five hundred out. Send books and due stamps and delegate if possible at once." In the afternoon, at 2:40 of the clock, he telegraphed: "To I. W. W. Hall, 3345 17th Street, San Francisco. Strike on in full demands turned down. I. W. W. ordered off the grounds but are here to stay. Send all speakers and wobblers possible. Money needed, lots of families destitute, boycott all employment sharks. Answer." It appeared at the trial that the term "wobblers" meant members of the I. W. W. He sent at the same time a message reading the same as last above "To Secy Ryan, Local 71, I. W. W. Hall, Sacramento"; also one "To Secy B. Sodder, I. W. W. Hall, San Pedro St., Los Angeles"; also one to I. W. W. Hall, 10th Street, Oakland, reading the same; and a similar one to "T. W. O'Brien, 228 So. Cal. St., Stockton"; also to Otto Gantz, I. W. W. Hall, 822 F. Street, Fresno; also one "To San Francisco *Bulletin*, San Francisco. Twenty-five hundred hop-pickers out on strike at Durst Bros ranch. Thirteen hundred to come on Horst Co. ranch to-morrow. Strike conducted by I. W. W. Send reporter to take news."

Much testimony was admitted describing in detail the conditions existing at the Durst hop-fields. We do not think it necessary to set out this testimony. It showed a situation calling for some radical reform measures in order to make it a desirable place for such numbers of people to work, both in respect of their moral and physical well-being. Bad as these conditions were, however, they furnished no justifica-

tion for the tragic events of that Sunday and need not be dwelt upon. Ford was the leader and spokesman of these hop-pickers. He conducted their meetings, of which there were several, during Sunday before the 5 o'clock meeting at which Manwell was killed. There was a meeting on the previous Saturday evening, largely attended, as these meetings generally were, the attendance estimated by some of the witnesses as fifteen hundred or two thousand—"nearly the entire camp," as one witness expressed it. The usual place of meeting was a platform slightly elevated from the ground and situated in the midst of the camp, near to the store, restaurant, and some places of amusement. These meetings were in the main orderly but plainly disclosed Ford's mastery and power to lead and control the more or less excited and turbulent body of persons comprising a considerable part of the assembled masses of striking and disappointed people, looking to their leader for guidance and relief. Suhr's telegrams show that it was an I. W. W. movement. In the earlier part of the day Constable Anderson made an effort to arrest Ford, but being challenged to produce a warrant, and not then being able to do so, and after some rather rough handling by persons around Ford, he desisted, but later a complaint was sworn to before a justice of the peace at Wheatland and a warrant was duly issued thereon and placed in Anderson's hands. The situation finally became so threatening that Sheriff Voss, of Yuba County, was sent for. He came to Wheatland and with him Deputy Sheriffs Reardon and Matthews. At Wheatland he was joined by District Attorney Manwell, Constable Anderson, Henry Daken, and A. W. Armstead, the two latter deputed as part of the posse. Robert Durst was also with them. They went to the Durst ranch in two automobiles, arriving together about 5 o'clock Sunday afternoon, driving near to where a largely attended meeting was in progress. Sheriff Voss directed Daken, Armstead, and Matthews to remain on the outside of the crowd. Sheriff Voss, Constable Anderson, Deputy Reardon, and District Attorney Manwell entered the crowd and went toward the platform where Ford was standing and had been speaking. Sheriff Voss's account of what happened is brief. He testified: "We arrived there at the hop-yards and I got out of the machine and started toward the crowd; and I got up close to the crowd and held up my hand and told them I was sheriff of Yuba County and 'In

the name of the people of the state of California, I demand you to disperse.' I can't remember the very words that I used but that is the sum and substance of it; and I hardly got through talking when I noticed a commotion at one side and I saw five or six men jumping on Constable Anderson . . . over there and I hadn't taken but one or two steps when I was stunned by something hitting me on the head and the next thing I remember I was turned and facing in the opposite direction and that is all I know about it." He testified that up to that time he had not heard any shots fired. He was asked if he saw anything of the deceased, Mr. Manwell, and replied: "Yes sir, as I started over there I saw Mr. Manwell away over there about ten or fifteen feet I judge from where I was, and he had his hand up in the air. . . . Q. Now, did you see Mr. Manwell again after you last saw him there, as I understand you, facing the crowd with his hand up? A. After I came to I saw him laying on the ground. Q. Was it near where you saw him with his hands up? A. About the same place. . . . Q. Did you draw your pistol or revolver there at that time at all? A. No, sir." He testified that his revolver was taken from him and it was gone "when he came to"; that when he started toward Anderson he drew his policeman's billy but he had no chance to use it and it was gone also. Constable Anderson is the only other survivor of the four officers who entered the crowd. Manwell and Reardon were shot and almost instantly killed. Constable Anderson testified that after the sheriff had told the crowd to disperse he observed that "Ford jumped down off the box" and Anderson stepped into the crowd to find him and "came right onto him. Q. Let us be particular about that now. A. He was all kind of crouched up like that (showing), and when I stepped in there I was surprised to see him so quick . . . and I said, 'Here, I have got that warrant you were talking about,' and he backed off and as he backed off he said, 'Hey, Hey, Hey,' and I said 'none of that,' and reached to grab him, and as I grabbed hold of him I hollered to the sheriff, I glanced that way (showing) and said, 'Here, Sheriff, here is the man we want.' And as I said 'Sheriff,' why, I was hit. . . . I came to laying on the ground. . . . The next thing I remember . . . I threw my hand down right quick and as I did I felt the shock of a shot in my arm here. Q. At the time you were shot you were on the ground. A. Yes

sir." He was asked how long it was from the time Ford cried "Hey, Hey, Hey" until he was struck. "A. It seemed like the same time that I said 'Sheriff' it seemed the same time I was hit. . . . It would seem from the time that he said 'Hey, Hey, Hey,' it seemed that they all looked around and the crowd milled around me and I grabbed him and I said 'Here, Sheriff, is the man we want' and I was hit, it took just about that long." Deputy Daken was one of the posse left on the outside of the crowd. What he saw from his standpoint he testified to as follows: "I had orders from Mr. Voss to stay on the outside of the crowd, I and Mr. Armstead and a man named Matthews; we stood there as Sheriff Voss and Mr. Durst and Mr. Reardon and Ed. Manwell and Lee Anderson walked into the crowd, and as they walked in Mr. Anderson said to the sheriff, he said—while the sheriff had his hand up he said, 'As sheriff of Yuba County, I demand peace,' and also Mr. Manwell had his hand up and he said, 'Keep the peace, boys, keep the peace,' and about that time Mr. Anderson reached over and said 'Sheriff, here is our man,' and he reached for Ford, and at that time they all commenced to beating with clubs and rocks and beat them down; and when I saw that there was no chance to get in there I said to Mr. Armstead, 'I am going to break this crowd up if I can,' and I fired a shot over their heads and the shooting commenced in general, and I fired the second shot before the crowd opened and when they opened I observed the bodies laying on the ground. Q. How did you fire the second shot? A. Over their heads; and I saw a Porto Rican, he was beating Mr. Voss with a club and I took it to be a police billy; it looked to me like it, and I hollered to him to 'cut it out,' and he kind of looked at me and offered to strike again and I shot him; and at that the crowd kind of surged and were throwing rocks and clubs and hitting me all over and I looked and saw a man come in from behind with a club that I recognized as Nelson afterwards, and yelled to him to stop and he kept coming and I shot; I shot him through the left arm if I remember right, and my shells were exhausted and I made my way for the store. Q. Now, Mr. Daken, you were standing there on the ground and the officers had gone in, can you give me a picture of what happened in there before you fired that first shot over their heads there, tell it in detail. A. My fellow officers were all beaten down before I fired the

shot; that is why I fired it. Q. Who were down? A. They were all down, Mr. Anderson, Mr. Voss, Mr. Manwell, Mr. Reardon. Q. And up to this time no shots had been fired? A. No sir. Q. Did you see the sheriff fall? A. I did. Q. You have given us the sheriff demanding peace and the district attorney asking for peace. Did the district attorney make any gesture, how was his hand? A. He held his hand up, and if I remember right he had a cigar between those two fingers. (Indicating.) Q. Did you see the defendants, or any of them, at that particular time? A. The only man I saw was Ford; as we drove up he was speaking and he stepped down off the box as the posse walked in. Q. Did you see Ford at the time the sheriff and district attorney, Mr. Manwell, had their hands up asking for peace? A. Yes sir. Q. Where was Ford at that time? A. He had just stepped down off the box."

A large number of witnesses, both for the prosecution and defense, testified to their recollection of what they saw and heard after the sheriff's posse arrived, and, as is not unusual, there was some conflict in this testimony. It was not clearly or satisfactorily shown who killed Manwell or Reardon or who shot Constable Anderson. Defendant claims that Manwell was shot by a hop-picker known as the Porto Rican with the gun he knocked out of Anderson's hand—a witness so testified. But if such was the fact it does not relieve defendant from his responsibility, for the Porto Rican was one of the confederates, all of whom, who were engaged in the original design, were equally guilty. Many details were brought out corroborative of the testimony given by Voss, Anderson, and Daken and some important facts not seen by either Voss or Anderson, who were down at an early stage of the fray. It is not necessary to go further into this phase of the case. It was clearly shown that the two officers were killed and Sheriff Voss and Constable Anderson beaten down into insensibility, the latter also shot and seriously wounded, by persons in the crowd which Ford had around him, and by persons who, as we think will appear from the testimony, were actuated in so doing by the encouragement given them by Ford and his influence over them. There were, as the testimony showed, fifteen or twenty shots fired—some witnesses said thirty—and it was shown that two of these were by Daken who fired over the heads of the crowd, with the third shot he killed the

Porto Rican and the fourth he fired at one of the crowd who was armed and approaching him, as he thought, in a hostile manner. All the other shots came from Ford's confederates. The important and vital question in dispute is—Does the evidence fix the responsibility for these fatal events, with reasonable certainty, upon Ford? To this question we will next address the inquiry.

At the Saturday night meeting Ford was the speaker. Witness Jameson testified to some of his utterances. Being asked what Ford said, he replied: "As I came up he was talking and he said 'the conditions here are hell' and he said 'if you people want to live in hell you can, but for my part I don't want to live in hell.'" One of the persons present made some protest "and quite a number wanted to make him (the intruder) shut up and Ford said, 'let him alone, it is only disturbing my meeting.' He said, 'There is no use of them sending any tin-horn scissor bill officers after me with stars on them as big as tin cans, they can't get me; if they get me they have got to have guns and they can't get me then.'" The expression, "scissor bill officer" and "scissor bill boss" occurs frequently in Ford's speeches and in responses sometimes by his audience, but no explanation was given of its meaning; that it was an epithet showing hatred is manifest.

Witness Earl Smith was running a restaurant at the camp. The platform where the people mostly assembled was near by. He testified to a meeting at the platform about half past 9 or 10 o'clock Sunday morning at which Ford was the speaker; that he read from a paper or had read the demands of the strikers in various languages; one of the crowd said, "it is better for every one to stand together, stick together"; that later they went to Durst's office. At about half past 1 or 2 o'clock the hop-pickers met again at the platform. At the close of the meeting Ford said: "Before we adjourn our mass meeting I have a few words to say. 'Now,' he said, 'I ask everybody to stand loyal to our demands' and he said, 'If the scissor bill boss don't meet our demands by 10 o'clock tomorrow he will go up in smoke,' and he said, 'Now, it is up to you people whether the scissor bill officers from Wheatland comes out here and arrests me or not,' he said, 'If they do come, I hope you tear them into dog meat,' and the crowd cheered and said, 'Yes, make mince meat out of them,' and he said, 'Now we are going to adjourn our mass meeting;

anybody that wants to know anything or any information about the strike report at the I. W. W.'s." This place was a frame building 12x14 called the Bull Pen at the hop-yards and about fifty steps from Smith's restaurant. Smith further testified that Constable Anderson came to his place between 10 and 11 o'clock, from the store, "and there was a large crowd following him and talking and some said, 'hop-head' and 'You big soak' and so on, and I came out of the restaurant before Anderson was at the pumping plant and I said, 'Get in the rig Lee, and I will take you to town, they are liable to murder you. . . . There was a big posse of people after him around the restaurant at that time and Mr. Durst came around the south side of the restaurant and motioned to Lee and said, 'Come on and I will take you to town,' and they got in the machine and started to town and they throwed rocks and said, 'You big hop head' and 'You big soak' and 'we will learn you to come out here and meddle with other people's business, we will teach you.'"

Witness Alvin James was at a meeting in the forenoon of Sunday at which the demands of the hop-pickers were stated by Ford to Durst; that Durst agreed to most of the terms but not all and refused the demand of \$1.25 per hundred for picking. The witness testified that when Durst left he heard Ford say that their demands had been refused and continued: "I want all of you that is in any way interested in this now to stand loyal to what I have said and done and we will see that he comes through with these demands." About 12 o'clock the people came together again, the witness said, about fifteen hundred of them, and Ford and some others were appointed a committee to see if Durst would come to their terms and later Ford reported that he had refused "and he told them the only other thing was to see that no other pickers came—to boycott all outside pickers."

Witness Phillips testified that he passed the crowd at a meeting about 11 o'clock and heard Ford say: "'The officers may get me yet,' he said, 'if they do I don't care a tinker's dam.' He said, 'If you people have any nerve that you will stand by me.'"

Witness Howard was present when Constable Anderson came into the camp and heard someone in the crowd say, "'There is one of the scissor bill s—of—b, now let's get him.'"

"I heard Blackie Ford say if we will stay together we will stay on the grounds and that the I. W. W.

had money enough to feed all the hop-pickers and that they would start a free lunch." Witness L. K. Smith testified that he was at a meeting about 1 o'clock and heard Ford addressing the crowd—"something about the scissor bill officers and the scissor bill boss and the constable not to take him. And one of the fellows out in the crowd in reply to that statement, he said that they would mob them if they did. Q. Mob who? A. The boss or the constable." Witness Frank Stineman testified that he was at the meeting about 10 o'clock Sunday and heard what was said to Durst and his reply and was at the meeting when the committee returned from Durst's office. He testified: "About 2 o'clock I heard the crowd yelling and went to see what was going on. The crowd was running around. They seemed to be like a bunch of wild people and Ford was running around with a bunch following behind him . . . and Ford was talking to them all the time telling them to stand loyal and they could not take him." Witness Lewis McCurry testified that he was at one of the meetings about half past 1 or 2 o'clock Sunday. He testified: "I thought I would stop and hear what he (Ford) was going to say and I heard him say 'Let the officers fire the first shot and then they would finish it.'" Deputy Sheriff Daken was at the hop-yard Sunday morning and was at the 10 o'clock meeting at the platform and heard Ford speaking and reading resolutions. He testified: "I heard Ford say at the morning meeting 'don't let them take me.' He was speaking to the crowd in general."

There is much other testimony tending to show that the hop-pickers very generally were wrought up to a high state of excitement and had placed their confidence in Ford to lead them successfully in securing better working conditions and better pay and when they assembled at 5 o'clock in large numbers they were, at least many of them, in such temper that not much was required, as was soon demonstrated, to induce them to resort to acts of criminal violence.

At this 5 o'clock meeting Ford was in charge and was the speaker and leader as he had been throughout the day and it appeared very clearly that the officers were expected any moment. Witness Alvin James was present. Speaking of the coming of the officers he testified: "Just before the automobiles drove up or as they were coming in Ford said, 'Well, boys,' he said, 'the sheriffs are coming and I suppose they will

get me,' and he said, 'I don't care a tinker's dam whether they do or not but if you are loyal to this cause and want to see that this thing is carried through you will stand by me,' and I don't know how many said 'we will knock their dam blocks off if they come in here.' " Witness R. R. Jameson was present at this meeting and testified: "Q. Did you hear any statements made by Ford prior to the sheriff's coming up? A. The only statement I heard otherwise than I have said, Blackie Ford said, 'Stand your ground,' or something like that. I couldn't catch all of it but he said, 'Stand your ground' just as the officers were coming up." Witness J. J. Hicks testified to what he heard and saw at this meeting. "Q. Tell us what if anything you heard Ford say? A. The first I heard him say was, they heard they had sent after the sheriff, something to that order and he guessed they would come after him and he said, 'here they come now and it is up to you fellows whether they take me or not,' and some of them said 'they won't take you.' Most of them hollered that and some of them said 'We will cut them into dog meat first.' " Witness L. K. Smith was present at this meeting. He testified: "When we got there someone said 'here they come' and Ford held up his hands and talked to the crowd and said he 'hoped they would stand loyal and not let them take him' or words to that effect." Witness Chester Cass testified: "Well, I left Wheatland and got there just about the same time the sheriff landed there; and as I got there some one was speaking up above the crowd; I could see him; I don't know who he was; he had both hands out and said 'stand your ground.' "

The principles of law already to some extent pointed out, it seems to us, are clearly applicable to the case here presented, and that the jury were fully justified in finding defendant Ford guilty as a principal in the murder of Manwell, although he did not himself fire the fatal shot. The conclusion of the jury that the unwarranted attack upon the sheriff and his assistants while in the execution of a lawful duty, resulting in the death of a deputy sheriff and Manwell, was the direct result of Ford's acts and conduct, was we think, fully justified by the evidence.

4. We are next to notice the evidence so far as it tended to connect defendant Suhr with the killing. We have already given the telegrams sent by him Sunday, August 3rd, showing that he was one of the organizers and conductors of the strike

and boycott. Witness Magruder testified to being present at a meeting of the hop-pickers held about noon of the 3rd of August and heard some talk about Durst not agreeing to the terms demanded. "He said he 'would not give the dollar and a quarter but would agree to everything else'; and they took up a collection to find out to see what they could do to send messages and while I was sitting there a little while afterwards there was a collection, and one man came up, I don't know his name, I didn't know until I came in here—Q. (Int.) Do you know now? A. Yes, I know now, that gentleman there. Q. Which one? A. Suhr—he said 'Blackie, I have thirty-three dollars.' . . . Mr. Suhr came and there was a man who had a shooting gallery opposite me, one of these target shooting games and this man came and said, 'You shut that up, we will not have any target shooting on the ranch, there is a boycott on the ranch.' Q. Who said that? A. Mr. Suhr, and this man that had the gun place, he said, 'I will give you twenty-five per cent of what I take in if you let me shoot this afternoon,' and Mr. Suhr said, 'You don't take me for a twenty-five per cent man, do you? You have got to shut up.' And that evening the shooting gallery moved away and he continued to say everything else would be closed up on the Durst ranch. Q. Who said that? A. Mr. Suhr said that, it looks like the man. Q. In your opinion is this the same man? A. Yes, I believe it to be the same man."

Four witnesses testified to certain admissions or confessions made by Suhr which will next be stated. Witness Francis Heenan, deputy sheriff of Yuba County, testified to a statement made to him by Suhr. The witness had been sent to the Sutter County jail, where Suhr was confined, to bring him to Marysville for the purpose of identifying some one. The statement was made on the way from the court house in Yuba City to the Northern Electric depot, where they got on the cars, some time about the middle of October, 1913. The witness was examined and cross-examined from which it appeared that Suhr had not been asked to make any statement; that no promises or inducements were held out to him or threats or coercion in any manner used and that the statement was "freely and voluntarily made." "Q. What was the statement, tell the jury? A. Well, he first spoke up and said, 'I wish they would take me out and shoot me or give me life imprisonment, I can't stand this thing' and I asked

him what was the matter and what was the trouble, and he said, 'about that shooting down at Wheatland.' Q. Tell it all. A. I asked him what kind of a gun he had and I said, 'there has been a couple of guns missed down there that we never got track of,' and he said, 'a small one' and I asked him what make it was and he said he didn't know and I asked him where he got it and he said he took it out of an old man's hand and that was about the extent of the conversation. . . .

Q. Have you given all of the statement to the jury which Mr. Suhr gave you? A. No. Q. Give it all, then. A. Well, since you call my attention there, he spoke about taking a couple of shots at the officers, and I asked him, if I recollect right, if he knew the names of the officers and he said, 'No, they were officers,' or words to that effect. Q. Anything further? A. Yes, I asked him if he hit anybody and he said he 'saw one of them fall—one of the officers fall.' Q. Where were you and Mr. Suhr at the time he made this statement to you? A. Walking from the court house to where we could catch the car, walking along the street." On cross-examination he testified that it was half a minute or a couple of minutes' walk to the car from the court house and that they walked along without stopping; that he had no further talk with Suhr on the way over to the court house nor on returning. H. O. Brown, a witness for the defense, testified that he measured the distance from the Sutter County court house "to the first turn where Heenan and Suhr took the street car" and found it three hundred and twenty feet.

Witness Bennett Schillig, deputy sheriff of Sutter County, testified to a statement made by Suhr on December 2, 1913, at the time the Ford case was set for trial. The witness was at the time under sheriff and in charge with the sheriff of the jail where Suhr was confined. He testified that no inducement or promise of immunity or reward for making the statement was given him and that "no coercion or duress or anything of that kind to make him make the statement" was used. He was asked to give the statement *verbatim* to the best of his recollection. "A. It was on the evening of the 2nd. Q. Of December? A. Yes, sir, and about between 8 and 9 o'clock; it was about 8 o'clock; it was my custom to go into the jail and lock Mr. Suhr into his cell; when I first went in he complained to me about the postponement of these cases and we had some little talk about that and he asked me my

opinion about it and about the cases and I told him I didn't know anything about the facts of the matter down there, and we had some little conversation in regard to Ford. Q. Tell us all of it as nearly as you can. A. He told me on other occasions that he was not well acquainted with Ford; in fact he said, 'We were not good friends while we were at Wheatland, not very good friends;' and that night when I was in there I said, 'Herman, I thought you told me you and Ford were not very good friends at Wheatland,' and he wanted to know why and I said, 'I noticed your greetings in the sheriff's office at Yuba County,' and I said, 'I thought Ford greeted you like a long lost brother,' and he said, 'Ford is not a bad fellow,' and he said, 'I used to get sore at him down there.' Mr. Royce: Never mind what he said about their not being—Mr. Carlin (Int.): I am not particular about it. Tell us about the shooting, what he said about it. Mr. Royce: All right, go ahead. It will all come out anyway. A. I am trying to repeat it as I have it in my mind; you will get me mixed up. Mr. Royce: It is my fault. A. Anyway in that remark I mentioned if he thought it was a good idea to be tried with the other defendants and he said he didn't know, and I said, 'Perhaps Ford was more guilty than you and it might have a bad effect on your case.' And he said, 'I am in worse than Ford,' that 'Ford did not have any gun,' and I said, 'Did you have one?' and he said, 'Yes,' and I said, 'Herman I don't know what to say about it, I did not know any facts of the matter.' He said, 'I will tell you,' and he said, 'When the officers drove up we were there at the platform,' and he said, 'The officers got out and come toward the platform and the first I knew,—he said, 'There was a man stepped up on a box or something he thought—it looked to me as though a man stepped on a box or bench and it broke down; the man went down and the trouble started' and the confusion was such that he couldn't tell who any one was, he didn't know any one there in town, didn't know any of the officers, but he was trying to get out through the crowd and as he passed some old man he handed him a pistol and he said, 'Young fellow, defend yourself.' He took the pistol and fired it; he didn't know exactly how many times; he said he might have fired a couple of times, he didn't know; and he felt a stinging in his arm and he got out of the crowd and went to some camp; he had been shot in the arm some place;

he didn't know the place but I think it was near the elbow, as near as I recall; but there at the camp some lady bandaged this wound and he started out and went down to the river and when he got to the river he said, 'I thought to myself what am I running away for, I will go back.' And as he started back and had gone a little ways he met Ford and some others. I don't remember now, I have forgotten, but it was either—"

At this point some discussion was had between counsel, after which the witness resumed the narrative: "A. Well, he said he thought, 'I have nothing to run away for, I will go back.' And he met Ford and these other parties. Q. State what he did, not what he said. The Court: If he stated anything further as to what he himself did, state it. A. Then he turned back and caught a freight train that was crossing the bridge and he rode on that freight train to Roseville and from Roseville he got a motor car and went into Sacramento and it was too late to get a train for Stockton and he remained all night in Sacramento and went home the next day to Stockton; and it was either the next day after or the second day, I don't know which, that there was some article come out in the papers in regard to Suhr and Ford wanted for murder and he was somewhat alarmed about it and he left there and went up into Tuolumne County, I believe it was, a timber camp where there was some seventy-five or eighty men working, and he worked in the kitchen as dish washer and waiting on the table; and he worked there about a month and he got to thinking the matter over and he thought he would come back to Marysville and surrender himself, and quit his job; that he told the foreman who he was and why he was quitting; and he got back to Stockton and there he saw some more articles in the papers in regard to the inhuman treatment that the prisoners were receiving in Yuba County; that they were compelled to lie on the floor and their bodies were covered with sores and he changed his mind about coming to Marysville and he concluded that he would go on to Arizona or to Mexico or some place to get out of the way for a while; and he started at that time; I can't remember all the details of his trip down there; he was several days going to Arizona and he was arrested there and brought back. Q. Was there anything by him said about the name he used in camp in Tuolumne County? A. Well, he said that he used

a different name, I can't recall whether it was there at Tuolumne or at Arizona that he used a portion of his own name; he didn't use all of his name; just a portion of it."

Witness Ben Manford testified to a statement made by Suhr on Sunday morning, December 14, 1913. Isaac Smallwood was a deputy sheriff and had charge of the jail at Yuba City and Manford went there to see Smallwood on some business. He had no official connection with the jail but was a constable or marshal. He found Smallwood with Suhr "in a little room in front of the cell" and "wanted to see him to give him a book to collect some taxes." Smallwood was talking to Suhr. "Mr. Carlin: Q. We have already brought you up in your testimony wherein you stated, I believe you said that on the 14th of December of last year Mr. Suhr, the defendant here, made a statement to you in the county jail at Yuba City. Now give the jury all that was said by him and you at that time as near as you can recollect it. A. I walked in the jail that morning hunting for Mr. Smallwood and I said, 'Good morning, gentlemen,' and I said—I see this man in there and I said, 'You just as well be in this morning as out, it is a bad day,' and said, 'Are you from Live Oak?' and he said, 'No,' and Mr. Smallwood said 'That man gave bail and went back,' and said he was in for murder. Q. What man? A. Mr. Suhr. Q. All right, this man said what? A. He said, 'I am held for murder in the Wheatland riot,' and I said, 'How is that, did you just happen to be standing around?' and he said, 'I had been there two or three days waiting for work and for my family,' and he said, 'This riot took place,' and he said, 'some man handed me a gun and I fired two shots at two men, and I turned and walked out. Q. You did? A. Yes, sir, I did, and Mr. Smallwood walked out. Q. Is that all that was said? A. Yes, sir, that is all I heard said."

Smallwood testified: "I am night man over there, deputy sheriff, and by instructions of Sheriff Noyes, to look after things there, and I make it a point to go around once in a while to see that everything is O. K. and that Sunday morning I was there and said good morning to the gentleman. Q. To Mr. Suhr? A. Yes sir, and he said, 'Hello Ike, how are you,' and I said, 'Pretty fair,' and by that time Mr. Manford came in. Q. And before Mr. Manford's arrival you and the defendant Suhr—had you and the defendant Suhr had any con-

versation or talk at all concerning the subject matter, concerning the statement he made to Mr. Manford? A. No, sir, none whatever. Q. Had he and you been talking in any way at all about the case that he was in jail on—on the charge? A. No sir. Q. In no way? A. In no way. Q. Did you hold out to him there at that time, hold out to the defendant Suhr any promise of reward or inducement to cause him to make a statement? A. I never did. Q. Did you ask him to make a statement? A. I never did. Q. Did you exercise or was there exercised at any time in your presence any coercion or duress to cause the defendant to make a statement? A. Never did. Q. Did anybody else in your presence? A. No sir. Q. Did Mr. Manford hold out any hope of reward or promise or use any duress? A. No sir. . . . Q. Now, did the defendant Suhr at that time and place, in the presence of yourself and Mr. Manford, make a statement concerning his complicity in the Wheatland shooting which resulted in the death of Mr. E. T. Manwell, tell the jury what the statement was. Mr. Royce: State the whole conversation. Mr. Carlin: Yes, sir. The Witness: Word for word? Mr. Carlin: Yes sir. A. I can't, word for word. Q. As near as you can. The Court: Give your best recollection. A. The best recollection was when Mr. Manford came back he said 'Good morning, Ike,' and I said, 'Hello, Ben,' and he stepped up and looked around and said, 'Good morning' to Mr. Suhr and he said 'Are you here yet?' and he said, 'Yes, I am here,' and the conversation led on and he said, 'Yes, I am in here regarding the Wheatland riot,' and he said, 'I didn't know that,' that is what I understood Mr. Manford to say. Then I understood Mr. Manford to say, 'Is that so,' and he said, 'Yes,' that is as near as I can remember it, and I understood him to say—Mr. Royce: (Int.) We will object to what you understood him to say. The Court: Your best recollection. A. In my best recollection Mr. Suhr said, 'I grabbed the gun and fired,' and I understood him to say he grabbed it from an old man, and then there was another word or two passed, I didn't catch it, and I said, 'Ben, I have got to be going,' and he said, 'All right.' That was the marshal. And that is about all that I heard. Q. Was there anything said there about shooting at anybody? A. I heard him say he fired. . . . Q. Have you stated all that you remember? A. All that

I remember outside of Mr. Suhr speaking to the marshal that he was expecting his family there."

Suhr testified in his own behalf. As to the conversation with witness Heenan he testified that he had none that he can remember. His testimony as to the statement made to witnesses Smallwood and Manford was: "Well, Mr. Smallwood came in there and talked to me and we were talking about the weather, and another fellow came in there and said, 'good morning' (presumably Manford), he said, 'you are better off inside than out,' and I said, 'I am not,' and he said, 'What are you in here for?' and I said, 'on account of the Wheatland trouble,' and he said, 'Did you have any gun and did you do any shooting?' and I said, 'I didn't and that was all that was said and they walked out. Of his conversation with witness Schillig he testified as follows: "When we left the court house I said to Mr. Schillig that I was going to buy a piece of tobacco and I went to the store and bought a piece of tobacco and I wanted to go across the street where the car stopped and he said 'Oh, come on, I am dry' and he went to the saloon and bought a bottle of beer for himself and he give me a glass of beer and he said one wasn't enough and he took another bottle and give me a glass and then we went out and stood on the corner and he let the car pass, and he said 'There goes the car' and I said 'We better walk than standing here' and he started off and left me standing there and I followed him off until we got across the street. He was about five yards ahead of me and I saw Mr. Stanwood there talking to two fellows and Mr. Stanwood looked at me as though he was going to grab hold of me and he didn't. And then we walked past the park and Mr. Schillig got into an automobile and I stood on the hind axle and held on with one hand until we got into Yuba City and he locked me up and he went over and got my supper and then he went to the post-office and came back and asked me what they made out to-day and I said that we were all going to be tried in one case, and he got mad at my attorneys and said he was going to slap them in the face if they came in there again. Q. Did he mention their names? A. Yes sir, Royce and Downing and started in cursing about a fellow named 'Burton' and then he said to me 'They haven't got any case against you and what do you want to be tried with those fellows for,' and I said 'I didn't think that they have any case against Ford, I didn't

see him doing anything,' and that is practically all that was said."

The foregoing is substantially Suhr's entire testimony, except as to his personal history up to the time he came to Wheatland, which showed that he had a wife and children and had pursued farming and various other honorable occupations.

A distinction exists, in legal contemplation, between admissions and confessions, as pointed out in *People v. Müller*, 122 Cal. 84, 87, [54 Pac. 523]. In *People v. Strong*, 30 Cal. 151, it was said: "A confession in criminal law is the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the same. The word 'confession' is not the mere equivalent of the words 'statements' or 'declarations.' The term 'confession' is restricted to acknowledgment of guilt. (1 Greenleaf on Evidence, 170.)" "An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence (without preliminary proof) merely because it may, when considered with other facts, tend to establish guilt." (*People v. Parton*, 49 Cal. 632, 638. See, also *People v. Le Roy*, 65 Cal. 613, [4 Pac. 649]. It was held, in *People v. Knowlton*, 122 Cal. 357, [55 Pac. 141], that declarations of the accused which are not confessions of guilt cannot be objected to as obtained under duress. (*People v. Ammerman*, 118 Cal. 23, [50 Pac. 15].)

It is perhaps not necessary to make any distinction between the different statements of Suhr testified to, for in each instance full preliminary proof was made of their voluntary character.

While the rule is that confessions are to be received with great caution (*People v. Gilbert*, 39 Cal. 664; 1 Greenleaf on Evidence, sec. 200) Mr. Greenleaf says: "When the admission is deliberately made and precisely identified the evidence it affords is of the most satisfactory nature." Speaking further on the subject and after stating certain cautions to be observed, he says: "Subject to these cautions, in receiving and weighing them it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law. Their value depends on the supposition that they are deliberate and voluntary, and on the presumption that a rational being will not make admissions prejudicial to his

interest and safety, unless when urged by the promptings of truth and conscience. Such confessions so made by a prisoner, to any person, at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are at common law received in evidence as among proofs of guilt." (Id., sec. 215.)

Admissions and confessions of a defendant which appear to have been voluntarily made may properly be received in evidence (*People v. Goldenson*, 76 Cal. 328, [19 Pac. 161]; *People v. Fredericks*, 106 Cal. 554, [39 Pac. 944]); they are substantial evidence of guilt (*People v. Chrisman*, 135 Cal. 282, 286, [67 Pac. 136]); and it seems to be well settled that where the *corpus delicti* is otherwise satisfactorily proven a defendant may be convicted on his uncorroborated confession. (*Andrews v. People*, 117 Ill. 201, [7 N. E. 265]; *Bartley v. People*, 156 Ill. 234, [40 N. E. 831]; *Wimberly v. State*, 105 Ga. 188, [31 S. E. 162]; *Mitchell v. State*, 45 Fla. 76, [33 South. 1009]; *Dugan v. Commonwealth*, 102 Ky. 251 [43 S. W. 418]; *Sullivan v. State*, 58 Neb. 799, [79 N. W. 721].) Where there is clear and positive proof of the *corpus delicti*, the court said, in *Wimberly v. State*: "It has been too often ruled to be now gainsaid, that such proof of the *corpus delicti* may be considered as a circumstance sufficiently corroborating a confession." Nor is it necessary that proof of the *corpus delicti* connect him with the commission of the crime, to authorize proof of admissions. (*People v. Tarbox*, 115 Cal. 57, [46 Pac. 896].)

It may be conceded that Suhr's telegrams, sent on August 3d, early in the morning and in the afternoon of that day, go no further than to show his activities in the strike and boycott and alone would not justify an inference of complicity in the conspiracy formed later in the day; and the same may be said of his connection with the meeting at which a collection was taken up. That he was, however, one of the prominent and influential spirits in keeping alive the feeling which finally culminated in a tragedy is fairly inferable from all the evidence, although we do not think that this alone would warrant an inference that he at any time prior to the 5 o'clock meeting contemplated forcible resistance to the officers or any open violation of law, as was the case with Ford. The proof of the commission of the crime was fully

established independently of any admissions or confessions of Suhr. These admissions and confessions, then, must be given whatever weight the law authorizes. There was in them sufficient to make him directly responsible for the death of Manwell, under the principles of law which we have applied to Ford's case, although he may not himself have killed Manwell. We cannot say that on the face of these confessions they appear to be unbelievable or inherently improbable. They were testified to by witnesses who stand unimpeached and whose official position would seem to carry with it some evidence of their character for truth and honesty. It may seem improbable that Suhr would have "given himself away" at a time when his counsel were preparing his defense, as is strongly urged. But is it less improbable that the witnesses to his confession committed perjury? However, the sole responsibility for accepting the testimony of these witnesses as true and making their own deductions from it was with the jury and with its conclusions the constitution of the state prevents our interfering.

5. Some alleged errors in giving and refusing instructions, not hereinbefore considered, and in rulings upon testimony offered will be briefly noticed.

It is claimed that defendants' requested instruction numbered 3, upon the question of reasonable doubt, was that given in the case of *Commonwealth v. Webster*, 5 Cush. (Mass.) 820, [52 Am. Dec. 711], and should have been given and was not in effect given by instruction 28. The criticism arises out of some expressions in the instruction given in addition to the form so often approved, and the safest to be used on the subject, as given by Chief Justice Shaw. For example, it reads in part: "The term 'reasonable doubt,' as referred to in these instructions is a term often used, probably pretty well understood, but not easily defined," etc. In its concluding paragraph the court said: "A doubt that will justify an acquittal must not only be a reasonable one, but must arise from a candid and impartial examination of all the evidence in the case, or from a want of sufficient evidence on the part of the prosecution to convince you of the truth of the charge." The suggestion to the jury that the term "reasonable doubt" is "pretty well understood, but not easily defined," was unnecessary but harmless. The other criticised language, it is claimed, "eliminates the plain mandate of the

law that the jury must be convinced beyond a reasonable doubt of the guilt of the accused." The jury were so plainly told that they could not convict unless the evidence convinced them beyond a reasonable doubt, and this admonition occurs so frequently in the instructions, that we cannot believe there was prejudicial error in not repeating it at the end of this paragraph.

6. The refusal to give defendant's instruction 21 was justified. It relates to the testimony of witnesses who may have had an interest in the result and states: "you have a right to disregard entirely the testimony of any witness whom you believe to have willfully testified falsely." The instruction fails to use the necessary qualifying words "in a material matter." Otherwise, the instruction would be misleading and not a correct statement of the law. Besides, the court instructed the jury that "a witness willfully false in one part of his testimony is to be distrusted in others."

7. The record is singularly free from alleged errors in rulings upon testimony admitted and refused. We feel justified in remarking that the learned trial judge showed a degree of patience and judicial equipoise and fairness not always found in hotly contested criminal trials lasting many days, as this did. But two assignments have been called to our attention and these are of little importance. One of defendant's witnesses was asked, on cross-examination, if he had ever attended any of the meetings of the I. W. W. and defendant's objection was overruled. A witness for the defense was asked, on his direct examination—"Did you ever hear any threats made there at that meeting Saturday evening?" Objection was sustained. He was then asked: "What if anything did you hear at that meeting?" and answered fully. We discover no error in these rulings.

The judgment and order are affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 9, 1914.

[Civ. No. 1223. Third Appellate District.—September 10, 1914.]

MARINA GIUFFRE, Appellant, v. GIUSEPPE LAURICELLA et al., Respondents.

PARTITION—TITLE TO PROPERTIES INVOLVED—FORMER ADJUDICATION.—In this action for partition it is held that the title to the two pieces of property involved was adjudicated in the former case of *Lauricella v. Lauricella*, 161 Cal. 61, which was an action for the establishment and enforcement of a constructive trust, that is, for a decree declaring and adjudging the property here involved to be held in trust by the plaintiff herein for the benefit of her husband, during his life, and, upon his death, one-half thereof to be conveyed in equal shares to his father and mother, and the other one-half to be retained by her, absolutely; and that the judgment in such former action operates as an estoppel against any claim of the plaintiff for any further or greater interest in each of the two parcels of property than that awarded to her by such judgment.

Id.—RES JUDICATA—GENERAL RULES AND REASONS THEREFOR.—All matters in litigation which become the basis of a judgment are *res adjudicata*, and to permit causes of action or defenses once presented, considered and definitely determined to be again asserted in another or subsequent suit or action would be in violation of the principles underlying and supporting that salutary doctrine—a doctrine indispensably essential to any well-regulated system of jurisprudence, because the effect of its operation is to put an end to litigation, or to stop repeated trials of precisely the same question between the same parties.

Id.—COMMUNITY PROPERTY—DISPOSAL OF BY GIFT OR WILL.—Although a husband has no power to make a gift of any part of the community property without the written consent of his wife, yet he has the power, without her consent, to make a will giving one-half of it to his father and mother.

Id.—CONVEYANCE OF COMMUNITY PROPERTY BY HUSBAND—ESTOPPEL AGAINST WIFE.—Where a man about to leave the country on account of bad health, and desiring to provide for his parents in case he does not return, conveys community property to his wife on her express agreement to hold it in trust for him during his life and at his death convey a half interest therein to his parents and herself retain the other half, she is estopped after his death to assert the invalidity of the deed under the rule that a husband cannot convey the common property without a valuable consideration unless the wife consents in writing.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. W. M. Conley, Judge presiding.

The facts are stated in the opinion of the court.

Geo. C. Sargent, and J. F. Cavagnaro, for Appellant.

Jas. C. Sims, and J. A. Spinetti, for Respondents.

HART, J.—This is an action in partition. The complaint alleges that the plaintiff is the owner of an undivided one-half interest in fee-simple in a certain lot (specifically described in the complaint) situated on Tremont Avenue, in the city of San Francisco, and that the defendants are each of them the owner of an undivided one-quarter interest in fee-simple in said real property; that the plaintiff is the owner of an undivided three-quarters interest in fee-simple in a certain lot (also specifically described in the complaint) situated on Oak Street, in said city, and that the defendants are each of them the owner of an undivided one-eighth interest in fee-simple in said last mentioned lot. It is alleged that said two parcels of property cannot be divided in kind without great disadvantage and loss to the owners thereof, and that it is, therefore, to the best interests of all the parties to this action that both of said pieces of property be sold separately, and the proceeds divided among the parties to the action, etc.

The answer denies that the plaintiff is the owner of an undivided one-half interest in fee-simple in the Tremont Avenue property, denies that she is the owner of a three quarters interest in the Oak Street property, and alleges that the defendants are the owners of a three-quarters interest in fee-simple in each of said pieces of property, and in support of these denials and allegations pleaded the judgment in a former action, in which Giuseppe Lauricella and Concetta Lauricella (respectively, father and mother of Domenico Lauricella) were plaintiffs and the plaintiff here, Marina Giuffrè, was the defendant, and involving both the pieces of property described in the complaint.

The court found that the plaintiff was the owner of an undivided one-half interest in fee-simple in each of the pieces of property mentioned in the complaint and that the defendants are each of them the owner of an undivided one quarter interest in each of said pieces of property, and entered an interlocutory decree accordingly and, furthermore, therein

ordered a sale of both pieces of said property and named a referee for that purpose.

The plaintiff prosecutes these appeals from said decree and the order denying her a new trial.

The controversy here involves solely the Oak Street property, and the objection to the findings and the decree is that, under the evidence and the record, the court should have found and adjudged that the plaintiff is the owner of a three quarters rather than a one-half interest in fee-simple in said property.

The facts of the case are not disputed, and may be stated in the language of the brief of counsel for the defendants as follows: "Domenico and Marina Lauricella were married in 1900. On June 16, 1904, the Tremont Avenue property was conveyed to Domenico Lauricella (the husband) by a bargain and sale deed. On February 7, 1906, the Oak Street property was conveyed to Domenico Lauricella and Marina Lauricella by a bargain and sale deed. On July 11, 1906, a deed describing both of these pieces of property was executed by Domenico Lauricella to his wife, the appellant. It was a bargain and sale deed, expressed consideration of ten dollars, and contained no terms indicating an intention to create a trust. Domenico Lauricella died on September 10, 1906, and Marina (his widow and the plaintiff) married Domenico Giuffr  on October 3, 1909. On March 26, 1907, an action was commenced in the superior court of the city and county of San Francisco, state of California, by Giuseppe Lauricella and Concetta Lauricella (respondents herein) against Marina Lauricella (appellant herein), numbered 7324, to obtain a judgment that the deed of July 11, 1906, from Domenico Lauricella to Marina Lauricella was made to her in trust, to hold the property for her husband while living, and after his death to hold one-half absolutely and to convey the other half, share and share alike, to Giuseppe Lauricella and Concetta Lauricella. Judgment went in favor of Giuseppe Lauricella and Concetta Lauricella, which was affirmed by the supreme court upon appeal. (161 Cal. 61, [118 Pac. 430].) Among the papers in that case is a satisfaction of the judgment, signed by plaintiffs' attorney, dated November 25, 1911. On November 15, 1911, pursuant to the judgment in *Lauricella v. Lauricella*, a deed was executed by Marina Lauricella to Giuseppe Lauricella and Concetta Lauricella, conveying

to the grantees an undivided one-half of all the right, title and interest received by her by operation of the deed of July 11, 1906."

The plaintiff introduced the following evidence and thereupon rested her case: 1 Deed from one Westwood to Domenico Lauricella, dated June 16, 1904, conveying the Tremont Street property to Domenico Lauricella; 2. Deed from McEwen Bros. to Domenico Lauricella and Marina Lauricella, dated February 7, 1906, conveying the Oak Street property; 3. Deed from Domenico Lauricella to Marina Lauricella, dated July 11, 1906, conveying both said pieces of property; 4. Deed from Marina Lauricella to Giuseppe Lauricella and Concetta Lauricella, dated November 15, 1911.

The defendant then offered and the court received in evidence the judgment-roll in the case of *Giuseppe Lauricella and Concetta Lauricella v. Marina Lauricella*, above referred to, after the plaintiff had objected to said evidence upon the following grounds: "1. That said judgment was not binding upon plaintiff because the *status* of the title to the real property described in said action and in the action at bar, came only collaterally into question; that any declaration in the findings and judgment in said judgment-roll as to the character of the title was not necessary to a decision of the matters involved; 2. That defendant in said judgment-roll was litigating in her capacity as trustee, and not as an individual; 3. That the parties to said action were not litigating for the same thing, or under the same title; that the cause of action in *Lauricella v. Lauricella* and in the action at bar were not the same."

The former action involving the two parcels of property described in the complaint in the present action was one for the establishment and enforcement of a constructive trust—that is, for a decree declaring and adjudging the property here involved to be held in trust by Marina Lauricella (now Marina Giuffrè) for the benefit of her husband, during his life, and, upon his death, one-half thereof to be conveyed in equal shares to the father and mother of the husband, and the other one-half to be retained by her, absolutely.

The complaint in said former action, after alleging the death of Domenico Lauricella, "alleges that Marina was his wife, and Giuseppe and Concetta, his father and mother; that on the 15th day of August, 1906 (should be July 11, 1906),

Domenico was the owner in fee of the Tremont Avenue and Oak Street properties; that it was all his separate property; that Domenico reposed great confidence in his wife, Marina, and, believing she would faithfully execute the trust, delivered to her on August 15th, a deed of the Tremont Avenue and Oak Street properties, upon the express agreement that she would hold them in trust for Domenico during his life, and that upon his death she would hold one-half for herself and deed the other half to Giuseppe and Concetta, in equal shares; that defendant accepted the deed to hold in trust, and without paying any consideration; that, since his (Domenico's) death, Giuseppe and Concetta had demanded a deed of one-half of the property, which had been refused; that Marina persisted in betraying the confidence of Domenico and in refusing to make such conveyance; that the deed, though absolute on its face, was intended to be in trust as aforesaid."

The answer to said complaint, besides containing certain denials, avers that Marina Lauricella was the owner of one-half of the Oak Street property in virtue of her right of community.

The court's findings were in accord with the allegations of the complaint, except as to the Oak Street property, and as to it the court found that that particular parcel of property was acquired during the married life of Domenico and Marina, and that it was, therefore, community property.

The position of the defendants is that the question of title to both pieces of the property described in the complaint was adjudicated in the case of *Lauricella v. Lauricella*, 161 Cal. 61, [118 Pac. 430], and that therein it was adjudged that an undivided one-half interest in fee-simple in each of said pieces of property was in the plaintiff in the present action and that an undivided one-fourth interest in each of said pieces of property was vested in each of the defendants in the former action, Giuseppe and Concetta Lauricella, and that, consequently, the judgment in said former action operates as an estoppel against any claim of the plaintiff of any further or greater interest in each of said parcels of property than that awarded to her by said judgment.

The plaintiff submits a variety of specific reasons for which, she contends, the judgment in the case of *Lauricella v. Lauricella*, 161 Cal. 61, [118 Pac. 430], will not support the plea of

res adjudicata in this action. The sum and the substance of them all are that the same questions were not litigated in said action as are involved in the present action and that the parties to the former action are not the same parties to this action. In other words, it is the contention that the plaintiff, in the former action, was sued in her capacity as trustee and not as an individual, and that her title to the Oak Street property, as an individual, was not put in issue or litigated in said action. Another contention is that, while the findings in said action make some reference to the ownership of the property described in the complaint, the judgment is absolutely silent upon that proposition, and it is argued that, inasmuch as an estoppel by judgment cannot be predicated upon a mere finding, but must rest wholly upon the judgment itself, there is no ground here for invoking, as a defense to the action, an estoppel by judgment.

From the foregoing and other propositions advanced for the purpose of showing that the title of the plaintiff to the property in dispute was not involved and litigated in the former action, it is contended that the plaintiff is entitled to assert here her full interests in the Oak Street property, viz.: An undivided one-half thereof by virtue of her right of community and one-half of the other undivided one-half, or altogether three-fourths thereof, the latter fourth going to her by descent as of separate estate. (Civ. Code, secs. 1402, and 1386, subd. 2; *Lauricella v. Lauricella*, 161 Cal. 61, [118 Pac. 430].)

An examination of the judgment-roll in the case of *Lauricella v. Lauricella* will clearly disclose that the proposition which it rests on the plaintiff to establish in order to prevail in this action, viz.: that the judgment in said action is not conclusive upon the question of the title to the property in dispute and that said judgment cannot, therefore, operate as an estoppel against her right to claim any greater interest in said property than is therein and thereby adjudicated and awarded to her, cannot be sustained upon any conceivable view of the record before us.

The judgment in said case reads, in part: “. . . The court having filed its written findings of fact and conclusions of law, and having ordered that judgment be entered that the real property described in the deed of July 11, 1906, of Domenico Lauricella, deceased, to Marina Lauricella, the defendant

herein, and set forth and described in paragraph 3 of plaintiffs' complaint on file herein, and set forth and described in said findings of fact filed herein, was deeded to said defendant by Domenico Lauricella, with the express promise, understanding and agreement that said Marina Lauricella was to hold said real property in trust for her husband, Domenico Lauricella, while living, and after his death, that she should hold one-half absolutely and should convey the other one-half, share and share alike, to the father and mother of said deceased, and that thereby a constructive trust was created—and having further ordered that the plaintiffs are entitled to judgment, and that said trust be enforced in favor of the plaintiffs, and that in accordance with the terms of said trust, defendant convey one-half of said real property to Giuseppe Lauricella and Concetta Lauricella, respectively the father and mother of said deceased, in equal shares, and that the defendant, Marina Lauricella, retain the other one-half of said real property absolutely in her own name and in her own right; . . . It is ordered, adjudged and decreed that the real property described as follows," describing the Tremont Avenue property, "also all that certain lot, piece or parcel of land . . . described as follows," describing the Oak Street property, "was deeded to said defendant, Marina Lauricella, by Domenico Lauricella, deceased, with the express understanding, promise, and agreement that said Marina Lauricella was to hold said property in trust for her husband, Domenico Lauricella, while living, and after his death, that she should hold one-half of said property absolutely, and should convey the other one-half, share and share alike, to the father and mother of said deceased, and that thereby a constructive trust was created.

"It is further ordered, adjudged and decreed that said trust be enforced in favor of the plaintiffs, Giuseppe Lauricella and Concetta Lauricella, and that, in accordance with the terms of said trust, defendant, Marina Lauricella, convey one-half of said property to Giuseppe Lauricella and Concetta Lauricella, respectively the surviving father and mother of said deceased, in equal shares.

"It is further ordered, adjudged and decreed that the defendant, Marina Lauricella, retain the other one-half of said real property absolutely in her own name and in her own right."

That the object of said action, as disclosed by the averments of the complaint therein, was to have determined and adjudicated the respective interests of the parties thereto in the property described in said complaint, is a proposition upon which there exists no possible ground for controversy.

It cannot be disputed that the complaint in the former action tendered an issue upon the question of the ownership of or title to the property, and that issue was joined upon that specific question is evidenced by the following allegation of the answer: “. . . In that behalf, defendant alleges that said conveyance was an absolute conveyance of all the right, title, and interest of said Domenico Lauricella in all of said real property described in said complaint, without any limitation or condition or trust whatsoever.”

As already shown, and, indeed, as is conceded, the findings followed the averments of the complaint, and it follows, therefore, that the court found that a trust in the property was created by Domenico and that, agreeably to the terms of said trust, the title to one-half thereof was, upon his death, to be conveyed to his father and mother.

It is only necessary to compare the judgment with the issues made by the pleadings and with the findings to readily perceive that the former not only adjudicated every essential issue in the case but that its scope is co-extensive with the findings. In other words, it is clear that the effect of the judgment was to establish and adjudicate these facts: 1. That Domenico Lauricella was the owner of the property in dispute; 2. That he conveyed the same to his wife in trust for himself for life, with the remainder in fee to his father and mother and his widow, the former each to take one-fourth, and the widow to take one-half thereof, and that she accepted the trust; 3. That Marina repudiated said trust and claimed that by the deed of conveyance from her husband to herself the whole of the property and the title thereto was transferred to and vested in her, without any condition, limitation, or qualification whatsoever; 4. That, conformably to said adjudication, it was further ordered, decreed, and adjudged that Marina, in pursuance of the terms of said trust, as found by the court and established by the decree, convey to the father and mother of the deceased their respective interests in said property.

Thus it is to be observed that the respective interests of the parties to the present action in both parcels of property

described in the complaint here were conclusively determined, established, and adjudicated in the former action.

It is elementary, of course, that all matters in litigation which become the bases of a judgment are *res adjudicata*, and that to permit causes of action or defenses once presented, considered and definitely determined to be again asserted in another or subsequent suit or action would be in violation of the principles underlying and supporting that salutary doctrine—a doctrine indispensably essential to any well-regulated system of jurisprudence, because the effect of its operation is to put an end to litigation, or to stop repeated trials of precisely the same question between the same parties.

In the present action, the plaintiff has attempted to reopen and renew the litigation of one of the several important questions which were conclusively determined against her and in favor of the defendants to the present suit in a former action. There is obviously no merit in the contention that because, so it is argued, the plaintiff here was sued in the other action in the capacity of a trustee and not as an individual, the parties to the former action are different from or not the same parties as those to the present action. In the former suit, the plaintiff was necessarily proceeded against both in her individual and in her representative capacity. As an individual, she claimed the entire property under the deed from her husband and, consequently, denied that the parents of her deceased husband were entitled to a share thereof. It was for the purpose of establishing her capacity as a trustee with respect to the property and of enforcing the trust, and, to that end, to establish the groundlessness of her claim to all the property as an individual, that the former action was instituted. Whether the property was wholly and absolutely conveyed to her or, as the complaint in the former action asserted, it was conveyed to her in trust for the purposes set forth in said complaint, rested wholly in parol, and the issues therein presented, considered and finally adjudicated affected her as an individual as well as a trustee. Indeed, the sole issue submitted by her in resistance to the claims of the plaintiffs in that action involved the assertion by her of sole ownership in her of the entire property—an ownership which she claimed vested in her at the moment of the delivery of the deed to her by her husband and an ownership necessarily inconsistent with the trust theory upon which the plaintiffs in said action

were required solely to rely to secure their shares of the property.

But the whole question of the right of the plaintiff to the one-fourth interest in the community property (the Oak Street real estate) which she is attempting to obtain through the medium of this action was passed upon and determined against her by the supreme court on the appeal in the former action. (*Lauricella v. Lauricella*, 161 Cal. 61, [118 Pac. 430].) There it was argued that, as by the terms of section 172 of the Civil Code the husband has no right to make a gift of community property, or convey such property, without a valuable consideration, in the absence of the wife's consent thereto in writing, a constructive trust in the community cannot arise or be created through or by means of a voluntary deed by the husband conveying such property to the wife. Replying to that proposition, the supreme court, through Mr. Justice Shaw, said: "In this case this puts the wife in the position of claiming a quarter interest in this parcel under the husband's deed, because said deed is void. The husband having died childless, leaving his father and mother surviving, if this deed is void the law would vest in the wife three-fourths of this parcel, one-half in virtue of her community right and one-fourth by descent as of separate estate, while the remaining fourth would go to the father and mother. (Civ. Code, sec. 1402; sec. 1386, subd. 2.) She can claim the last mentioned fourth only under this deed and, in view of the conclusions hereinbefore stated, only upon the ground that the deed is ineffectual to convey anything. If she accepts the grant at all, she must take it with the burden and upon the trust by means of which she received it. Her claim of the entire estate under the deed constitutes an effectual estoppel to prevent her from asserting in the same breath that the deed is invalid as to one-fourth. (*White v. Stevenson*, 144 Cal. 112, [77 Pac. 828].)

"She is estopped by her conduct from claiming the other one-fourth interest as well. Although her husband had not power to make a gift of any part of the community property without her written consent, yet he had the power without her consent to make a will giving one-half of it to his father and mother. (Civ. Code, sec. 1402.) The facts are that Domenico was in poor health and was intending to depart for Italy in hope of recovery, and he desired to make some provision for

his father and mother in case he did not return. He could at that time have made a will giving them one-half of this parcel. Instead of making the provision by that method, he chose to rely upon his wife and transferred it to her upon her promise to carry out his wishes by transferring it to them after his death. To this, with presumed knowledge of his power to do it by will, she agreed. It does not lie in her mouth to say now that if she had then refused to consent he would not have made the same provision by will. And having then, by her consent, prevented the making of the disposition by way of devise, she is clearly estopped, now when death has ended his powers, to say that the arrangement made with her consent shall not be carried out because it was not within his power then to carry it out in that mode without her consent in writing. Her allegation in her answer that it was acquired after the marriage, and therefore community property, authorizes the plaintiffs to rely on the estoppel in regard to that claim, without pleading it specially. (Code Civ. Proc., sec. 462; *White v. Stevenson*, 144 Cal. 112, [77 Pac. 828]; *Fox v. Tay*, 89 Cal. 344, [23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897]; *Moore v. Copp*, 119 Cal. 432, [51 Pac. 630].) ”

The foregoing language conclusively shows and determines not only that the question of the right of the plaintiff to the additional one-fourth interest in the Oak Street property which she is seeking to secure by means of this action was lost to her when she accepted the trust and its burdens and consequences, but it further shows that said question was presented, litigated, and adjudicated in the former action, and that the judgment in the latter action operates as an estoppel to the maintenance of the present action. Indeed, while we have thought it proper to give this record a somewhat extended consideration, we are nevertheless at a loss either to perceive or to conceive any theory upon which, under the circumstances as disclosed to us, the plaintiff could ever have hoped to maintain this action.

The judgment and the order appealed from are affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 9, 1914.

[Civ. No. 1286. Third Appellate District.—September 11, 1914.]

ELPHA CASSIDY, Petitioner, v. C. W. NORTON, as Judge
of the Superior Court, Respondent.

PARTIES—SUBSTITUTION OF DEFENDANTS—PROCEDURE—JURISDICTION OF COURT.—Where an action is brought against a bank to recover money to which adverse claims are made, and the bank pays the fund into court and applies to have the sheriff, who has levied an attachment on it, substituted as party defendant, accompanying the application with an affidavit setting forth the necessary facts for an order of substitution, the court has jurisdiction to make the order, although the bank previously had filed its answer but not before filing notice of the motion for substitution.

Id.—ORDER SUBSTITUTING PARTIES—ERROR OF COURT—MANNER OF REVIEWING.—The court in such case, having jurisdiction of the parties and of the subject matter of the action, has the legal right to decide the question of substitution, and if its decision is erroneous, the error cannot be corrected on *certiorari* but must be reached by an appeal from the final judgment in the case.

Id.—JOINDER OF PARTIES DEFENDANT—POWER OF COURT TO ORDER.—In such case the trial court has jurisdiction, under section 389 of the Code of Civil Procedure, on motion of the sheriff, to have other claimants of the money joined as parties defendant.

CERTIORARI to review orders of the Superior Court of San Joaquin County. C. W. Norton, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, and W. F. Lynch, for Petitioner.

C. L. Neumiller, and George A. Ditz, for Respondent.

BURNETT, J.—Petitioner seeks to have annulled two certain orders made by the superior court of San Joaquin County. The application is grounded, of course, upon the contention that the court thereby exceeded its jurisdiction. An alternative writ of *certiorari* was issued by this court and in the return of respondent we have a full record of the proceedings of the lower court.

The first of these orders was made upon the fourth day of May, 1914, and was an order of substitution in the case of Elpha Cassidy v. Commercial and Savings Bank and provided

and adjudged "that upon payment by the above named defendant, Commercial and Savings Bank, a corporation, into the superior court of the state of California in and for the county of San Joaquin, to the clerk of said court of the sum of twelve hundred fifty dollars in gold coin of the United States of America, Wm. H. Riecks, sheriff of the county of San Joaquin, be and he hereby is substituted as defendant in this action for and in the place of said Commercial and Savings Bank and that said Commercial and Savings Bank, a corporation, be and it hereby is dismissed and discharged as defendant in this action and from all liability in or as to the matter in this action, or to said Wm. H. Riecks, said sheriff, or to him for or on account of levies of writs of attachment or execution."

The second order was made on the fifteenth day of June following and provided that John T. Lewis, A. L. Farrington and F. B. Hubbard be joined as parties defendant and that plaintiff file a supplemental complaint joining said parties as defendants and requiring the service of the same upon them.

Both of these orders are clearly authorized by the statute. Section 386 of the Code of Civil Procedure provides: "A defendant, against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order."

Every fact thus required to be presented was set forth in an affidavit of defendant accompanying a notice to the adverse party of an application to the court for such order of substitution. We can perceive nothing that was omitted therefrom. Indeed, it seems to have been eminently proper that the defendant should be relieved of any responsibility in the premises on the payment of the money into court, as, by reason of adverse claims, it could not safely determine to whom the payment should be made. The bank laid no claim to the money and the sheriff having levied upon it a writ of attach-

ment and of execution, it naturally sought to have him substituted. But whether the sheriff was, as a matter of fact, the proper party to be substituted, the showing required by the statute was made and we think there can be no doubt that the court had the legal right—in other words, the jurisdiction—to make said order of substitution.

The only pretense of objection to the power of the court in the premises grows out of the fact that an answer was filed by the original defendant before said order of substitution was made. But before said answer was filed said defendant filed in the court a written notice of motion for the substitution and also said affidavit setting forth the grounds for said motion and offered to pay into court the sum of money claimed by the plaintiff. We consider said proceeding of the defendant as an "application" in the sense of the statute. The provision is that "at any time before answer" the defendants "may apply to the court" for an order of substitution. The defendant was not required to take the risk of being in default, not knowing, of course, whether the court would make the order of substitution. And since the application for such order was set for hearing at a day beyond the stipulated period for answering the defendant very properly filed said pleading, expressly declaring that it did not waive "its motion for substitution of Wm. H. Riecks, sheriff of the county of San Joaquin, state of California, as defendant for and in its place and stead herein, or its notice of said motion served and filed heretofore on April 9, 1914, but insisting thereon."

We think said defendant acted within the letter and spirit of the law and no error was committed.

But, at any rate, the court had jurisdiction of the parties and of the subject matter of the action and it had the legal right to decide the question of substitution and if its decision was erroneous the error could not be corrected on *certiorari* but must be reached by an appeal from the final judgment in the case. (*Hibernia S. & L. Society v. Lewis*, 117 Cal. 577, [47 Pac. 602, 49 Pac. 714].)

We can discover even less reason for annulling the second order.

The substituted defendant regularly moved the court for an order to substitute as sole defendants said Farrington, Hubbard, and Lewis. In his affidavit in support of said motion he set out that at the instance of said Farrington and Hub-

bard who were plaintiffs in an action against Frank E. McClellan and Minnie McClellan, affiant, as sheriff of the county of San Joaquin, had served a writ of attachment on all the moneys and credits of said defendants in said Commercial and Savings Bank and also that he had served a writ of execution on said moneys and credits in an action wherein John T. Lewis had obtained judgment against said Frank E. McClellan and Minnie McClellan and that thereafter the said Commercial and Savings Bank had paid into court the sum of one thousand two hundred and fifty dollars, being all the money and credits that it claimed to have and belonging to the said Frank E. McClellan and Minnie McClellan.

In fine, it clearly appeared that the said Farrington, Hubbard and Lewis were claimants of said money and were, therefore, necessary parties to the action and that their participation was requisite to a final determination of the controversy as to whom the said money should be paid.

The condition was clearly one contemplated by section 389 of the Code of Civil Procedure providing that "when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served." The court seems to have acted entirely within the authorization of this statutory provision and we can find neither irregularity nor excess of power in its proceeding.

We are satisfied that the question of jurisdiction, the only consideration herein involved, must be resolved against petitioner, and the order to show cause is discharged and the peremptory writ denied.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 9, 1914.

[Civ. No. 1231. Third Appellate District.—September 11, 1914.]

THOMAS H. BREEZE, Plaintiff and Appellant, v. INTERNATIONAL BANKING CORPORATION (a Corporation), Defendant and Respondent; LLOYD M. ROBBINS, Defendant.

ACTION TO RECOVER MONEY—FRAUD AS BASIS OF RECOVERY—FINDINGS—INCONSISTENCY BETWEEN PROBATIVE AND ULTIMATE FACTS.—In this action by a partner against his copartner and a bank to recover a certain sum of money on the ground that they conspired to induce him to transfer his interest in a partnership order for the payment of money, for less than its value, by concealing the fact that the order was to be paid by a solvent third person, wherein the plaintiff contends that the judgment in favor of the bank is not supported by the findings because of an inconsistency between the probative and the ultimate facts found by the court, it is held that there is no real inconsistency, and that even if there were the same would not support his appeal, since the ultimate facts were not based upon or deduced from the probative facts, nor in any degree dependent upon them.

ID.—FRAUDULENT ACTS OF PARTNER—NONPARTICIPATION BY CODEFENDANT—PRESUMPTION ON APPEAL.—Upon this appeal from the judgment upon the judgment-roll alone, the finding that the bank had no hand or took no part in the fraudulent acts by means of which the plaintiff was wrongfully deprived of his interest in the order, can rest upon the presumption, which must be indulged when the appeal, as here, is not supported by a bill of exceptions or statement or other duly authenticated record of the evidence, that there was received into the record evidence sufficient to justify and support it.

ID.—FINDINGS OF PROBATIVE AND ULTIMATE FACTS—INCONSISTENCY.—Where the trial court makes both probative and ultimate findings and the one set is inconsistent with the other, the former will not, in general, control, limit, or modify the latter.

ID.—APPEAL FROM JUDGMENT—CONSIDERATION OF PROBATIVE FACTS.—Upon an appeal on the judgment-roll alone, only the ultimate facts found by the court, not the probative facts which have no proper place in the findings, can be considered.

ID.—FINDING OF PROBATIVE FACT—WHEN CONTROLS ULTIMATE FACT.—It is only in those cases where it clearly appears that the ultimate fact found is based upon and deduced from findings of probative facts, and it is plain that the latter do not justify or support the ultimate fact found, that the findings of probative facts will control that of the ultimate fact and so bereave the judgment of support.

ID.—PARTNERSHIP—DEALING BY PARTNER WITH THIRD PERSONS—ASSUMPTION OF GOOD FAITH.—Where a partner is dealing with a third person respecting partnership money or property, the latter has the right to assume that the partner is acting in perfect good faith toward and with full authority from his copartners with regard to the transaction, and the fact that it may appear that the transaction, when consummated, will result solely to the benefit of the partner conducting it, constitutes no ground for an implication of fraud on his part toward the other partners in thus disposing of or handling the partnership assets.

ID.—CONSIDERATION FOR SALE—CANCELLATION OF ANTECEDENT DEBT.—The cancellation of an antecedent debt, due the vendee from the vendor, for the sale of property, constitutes a valuable consideration.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Seawell, Judge.

The facts are stated in the opinion of the court.

Charles H. Fairall, and Thomas H. Breeze, *in pro. per.*, for Appellant.

Richard Bayne, and Pillsbury, Madison & Sutro, for Respondent.

HART, J.—The plaintiff instituted this action for the purpose of recovering from the defendants the sum of three thousand two hundred and fifty dollars, together with interest from the fourth day of April, 1907.

The trial court gave the plaintiff judgment in the sum of \$3,741.26 against the defendant, Robbins, but rendered judgment in favor of the bank.

This appeal is prosecuted by the plaintiff on the judgment-roll alone from that part of the judgment which was rendered and entered in favor of the bank.

The gist of the complaint, in brief and in substance, is that the defendants jointly entered into a fraudulent scheme whereby Robbins was enabled to and did defraud the plaintiff out of his share of a certain sum of money which was paid to the bank and Robbins upon a certain order executed in favor of and delivered to the plaintiff and Robbins as copartners, the details of which transaction to be hereinafter more particularly set out.

The allegations of the complaint are met by denials by the defendants, they having filed separate answers.

The ultimate question submitted by this appeal is whether the judgment in favor of the defendant bank is supported by the findings. The specific contention of the plaintiff is that the ultimate facts found by the court are inconsistent with and, therefore, not supported by certain probative facts likewise found.

The questions thus propounded will require an extended statement of the facts as found by the court. They are: The plaintiff and the defendant, Robbins, are lawyers by profession and, up to the tenth day of June, 1907, were copartners in the practice of the law. On the fifth day of September, 1905, one H. C. Stilwell retained said Robbins and Breeze as his attorneys in certain pending litigation to which he was a party, and on said day, for the purpose of compensating them for their professional services, he made, executed and delivered to Robbins & Breeze a certain order for the payment of the sum of seven thousand five hundred dollars, which was in the following words and figures:

"Sept. 5th, 1905.

"W. H. HIGH, Esq.,

"M'g'r. International Bkg. Corporation,

"San Francisco.

"Dear Sir:

"Please pay Lloyd M. Robbins seven thousand and five hundred (\$7500) dollars and charge same to my account and hold any securities that you may have in which I am interested, as security for the same.

"H. C. STILWELL."

On the day of the execution and delivery of said order to Robbins & Breeze, Robbins indorsed the same as follows: "Pay to International Banking Corporation. Credit to a/c of Robbins & Breeze. LLOYD M. ROBBINS."

The findings then proceed:

"IV. At the time Stilwell made and delivered this order he was the owner of a certain promissory note made to his order by the American Magnesite Company, a corporation, which note had theretofore been by him pledged to the defendant International Banking Corporation (hereinafter styled the bank) to secure the payment of certain monies which he then owed that defendant.

"V. At that time and at the time of the deposit of this order by Robbins as hereinafter found, Robbins was indebted to the bank in the sum of two thousand nine hundred dollars.

"VI. Robbins after so indorsing this order deposited it with and pledged it to the bank and the bank accepted it as collateral to secure the payment of the debt so owed by Robbins. At the time of such deposit the bank knew and had full notice that the plaintiff was the owner of a half interest in this order. The pledge of this order by Robbins was made wholly without the consent or knowledge of the plaintiff and he never consented thereto, but nothing further was ever done by the bank or by any one else under or by virtue of said pledge of the said order.

"VII. The note of the American Magnesite Company to Stilwell had been pledged to the bank under an agreement whereby the bank was authorized upon maturity and nonpayment of the debt due from Stilwell to the bank, to sell the note at private sale and at the time of its sale, hereafter found, Stilwell had pledged to the bank and the bank held certain other securities owned by him, as further security for his indebtedness to the bank, subject also to the terms of that agreement.

"VIII. On the 4th day of April, 1907, the indebtedness due the bank from Stilwell was matured and unpaid and on that date one A. B. Bowers made an offer to purchase the American Magnesite Company's note and the other securities so held by the bank as pledges, and to pay therefor a sum equal to the amount of the Stilwell indebtedness to the bank and also to give his note payable to the order of Robbins payable one year after date without interest for the sum of seven thousand five hundred dollars in lieu of and in substitution for the said order theretofore made and delivered by Stilwell as hereinbefore found. Such offer was then and there accepted by the bank and by Robbins, but was not at any time by either of them communicated to plaintiff, and he was wholly without knowledge thereof until the 19th day of October, 1909.

"IX. Bowers thereupon on the 4th day of April, 1907, gave his promissory note to the bank for the sum of twelve thousand seven hundred ninety-five and 90/100 dollars, the amount of Stilwell's indebtedness to the bank, which note was by him paid on the 25th day of April, 1907, and gave his note

payable to the order of Robbins payable one year after date without interest for the sum of seven thousand five hundred dollars and the bank thereupon sold to Bowers the American Magnesite Company's note and the other securities so by it held as pledgee.

"X. On the 6th day of April, 1907, Robbins represented to and told plaintiff that the bank had sold the American Magnesite Company's note and the other securities to Bowers for the amount of the indebtedness due from Stilwell to the bank, but Robbins did not at that time or at any other time tell or inform plaintiff that Bowers had given Robbins the promissory note, hereinbefore found to have been so given. Robbins at that time further represented to plaintiff that by reason of such sale Stilwell was practically insolvent and without present means or ability to pay his order, hereinbefore found to have been by him made and delivered. By means of such statements and representations Robbins induced plaintiff to, and plaintiff did, offer to sell all his right, title and interest in and to said order to Robbins for the sum of five hundred dollars.

"XI. On the 10th day of April, 1907, Robbins stated to plaintiff that he would accept such offer and stated that he had no reason to believe that the order would be paid but that he was willing to take a chance that it would be paid. Upon such representation and relying wholly and implicitly thereon and in total ignorance of the note which Bowers had given to Robbins, plaintiff agreed to assign his interest in the said order to Robbins, and upon the 11th day of April, 1907, Robbins paid plaintiff the sum of five hundred dollars and plaintiff assigned, set over and transferred all his interest in the order to Robbins. Plaintiff prior to said time had made no sale, assignment or transfer of his interest in said order to Robbins or to any one whomsoever.

"XII. Robbins' indebtedness to the bank on the 4th day of April, 1907, amounted to over ten thousand dollars, and continued in excess of such sum until the 25th day of April, 1907, when said note so given by Bowers to Robbins was paid as hereinafter found.

"XIII. On the 25th day of April, 1907, Bowers offered to Robbins to pay the sum of six thousand five hundred dollars forthwith in full satisfaction of said note, which offer was thereupon accepted by Robbins, and thereupon Bowers paid

the sum of six thousand five hundred dollars to the bank as pledgee of said note and on account of Robbins, in full satisfaction thereof, and the sum so paid was by the bank forthwith applied to the partial satisfaction and payment of Robbins' then existing indebtedness to the bank.

"XIV. On the 6th day of May, 1907, plaintiff for the first time discovered that the said order so made and delivered by Stilwell had been paid by Bowers and plaintiff at once made inquiry both of Robbins and the bank whether or not Robbins knew that Bowers was going to pay the order, before plaintiff had so assigned, transferred and delivered his interest in the order to Robbins, and both Robbins and the bank denied that Robbins knew that Bowers was going to pay the order, at the time when plaintiff made such assignment. Plaintiff made diligent search to discover whether Bowers had promised to pay the Stilwell order prior to the 10th day of April, 1907, and the said assignment by plaintiff to Robbins, but was unable to make discovery and had no knowledge or notice of that fact or of the note so given by Bowers to Robbins until the 19th day of October, 1909. . . .

"XVI. The bank neither lent nor advanced the sum of five hundred dollars to Robbins, which Robbins paid to plaintiff as hereinbefore found, but the said sum of five hundred dollars was advanced by the father of Robbins, and the bank acted simply as the agent of Robbins in paying to Breeze the said sum of five hundred dollars.

"XVII. Robbins did not inform the bank prior to the 4th day of April, 1907, or at any time prior to the 11th day of April, 1907, that plaintiff had assigned his interest in said order to him, Robbins, or that he, Robbins, had purchased plaintiff's interest in said order. The bank believed and knew that plaintiff had an interest in said order until the 11th day of April, 1907, when plaintiff assigned and sold his interest.

"XVIII. The bank never at any time informed plaintiff of the giving of the note by Bowers to Robbins. The payment of the sum of five hundred dollars to plaintiff was made to plaintiff by Wm. H. High, the manager of the bank, for the account of Robbins, and the fact of the giving of the note by Bowers to Robbins, of the assignment by plaintiff of his interest in said order to Robbins, and of the payment of said note by Bowers were each and all fully known and understood by the bank at the time of the happening of each and at no time

did the bank make any inquiry or take any steps to learn whether or not plaintiff was aware of the existence of the note from Bowers to Robbins at the time when plaintiff made such assignment, and the bank had no knowledge at any time prior to the twelfth day of April, 1907, that, nor did it make any inquiry whether, Breeze had received a consideration in addition to the said sum of five hundred dollars paid by Robbins to Breeze, as hercinbefore found; nor did the bank have any knowledge at any time prior to the twelfth day of April, 1907, that, nor did it make any inquiry whether, Breeze did not know on or before the eleventh day of April, 1907, that Bowers had given to Robbins his note hereinbefore found to have been given.

"XIX. The bank never conspired or confederated together with Robbins or any one whomsoever, to induce plaintiff to sell his interest in said order for a sum very much below its real value or for any sum; never by any representations nor in any manner procured or induced plaintiff to assign his interest therein, and while it gave plaintiff no information of any of the facts hereinbefore found it never by any act or statement concealed any knowledge from plaintiff."

We are unable to discover any inconsistency between the alleged probative facts and the ultimate facts found by the court, and, even if there existed between them the inconsistency claimed by the plaintiff, we would still be at a loss to understand how that fact could support his appeal, since it is manifest that the ultimate facts were not based upon or educed from the probative facts.

Where the trial court makes both probative and ultimate findings and the one set is inconsistent with the other, the general rule is as it is declared in the case of *Perry v. Quackenbush*, 105 Cal. 299, [38 Pac. 740], as follows: "Findings of probative facts will not, in general, control, limit, or modify the findings of the ultimate fact. The province of the trial court is to find the ultimate facts, and not probative facts. If, from a consideration of the probative facts, this court should determine that they did not justify the finding of the ultimate fact, it would determine that the evidence did not justify the decision. This, it has been repeatedly held, cannot be done in this mode."

In *Pio Pico v. Cuyas*, 47 Cal. 174, 178, it is said: "It has been repeatedly held that a finding of the court cannot be

impeached upon the ground that it is contrary to the evidence otherwise than by a motion for a new trial and statement of evidence upon the motion. We can consider upon appeal from the judgment only the ultimate facts found by the court, and not the probative facts which have no proper place in the findings." (See, also, *Smith v. Acker*, 52 Cal. 217; *Frazier v. Crowell*, 52 Cal. 399; *Gill v. Driver*, 90 Cal. 72, [27 Pac. 64]; *Rankin v. Newman*, 107 Cal. 602, [40 Pac. 1024, 41 Pac. 304]; *Commercial Bank v. Redfield*, 122 Cal. 405, [55 Pac. 160, 772]; *Brown v. Mutual Reserve Fund Life Assoc.*, 137 Cal. 278, [70 Pac. 187].)

It is only in those cases where it clearly appears that the ultimate fact found is based upon and deduced from findings of probative facts and it is plain that the latter do not justify or support the ultimate fact found, that the findings of probative facts will control that of the ultimate fact and so bereave the judgment of support. The enunciation and application of this rule is to be found in the cases of *People v. Reed*, 81 Cal. 70, 76 [15 Am. St. Rep. 22, 22 Pac. 474], and *Geer v. Sibley*, 83 Cal. 1, [23 Pac. 220]. In the *Reed* case, which was an action to secure a judgment adjudging a certain strip of land in the city of San Jose to be a public street of said city, the position of the city being that it had been so dedicated by certain acts of the owners of said strip, the supreme court reversed the judgment because the ultimate fact of dedication was obviously predicated upon but not supported by certain probative facts previously found. The finding of the ultimate fact read, in part: "That *by the acts, facts and matters above found and recited*, said premises referred to and described were by said several parties dedicated," etc. The court said: "It may be that if this finding had stood alone, and had not been put in this argumentative form, it might have been upheld as a sufficient finding of an ultimate fact. But this cannot be so where the facts are fully found, and the general finding of a dedication is expressly drawn as a conclusion from such facts. Counsel say it does not appear that the court found all of the facts proved. But it does appear from the finding itself that it was based entirely upon the facts found, and not, in whole or in part, on facts proved but not found. Therefore, if the specific facts found do not support this one, which is a summing up of the others, the judgment should be reversed." In

Geer v. Sibley, 83 Cal. 1, [23 Pac. 220], precisely the same proposition arose, the trial court having founded its findings of the ultimate fact upon findings of probative facts showing that the defendant rather than the plaintiff was entitled to judgment, the latter having prevailed in the court below. (See *People v. McCus*, 150 Cal. 198, [88 Pac. 899].)

In the case at bar, the gravamen of the plaintiff's charge against the bank is that it and Robbins "willfully, maliciously and with intent to defraud plaintiff, conspired and confederated together to induce plaintiff to sell his interest in the order for a sum very much below its real value, by concealing from plaintiff all knowledge of the fact that Bowers had offered to pay said order, and to apply the money to be received from Bowers on account thereof to the payment of the debt due from Robbins to the bank."

The court found, as above shown, that the foregoing allegation was not true in any respect, and that, while the bank gave the plaintiff no information of any of the facts characterizing the several transactions affecting the order from Stilwell to the plaintiff and Robbins and the money finally realized thereon, "it never by any act or statement concealed any knowledge from plaintiff."

There is nothing perceivable in the probative facts found, as an examination of them will readily affirm, which shows that the bank entered into a fraudulent scheme or in any manner or measure connived with Robbins in the defrauding of the plaintiff of his just share of the money which constitutes the subject of this controversy. There is, in other words, no statement among the probative facts from which the conclusion is forced that the bank's part in the transactions relating to the Stilwell order and the money realized therefrom was characterized by fraud or malversation of any character.

There are but two propositions deducible from the probative facts found by the court from which any implication of bad faith on the part of the bank in the transactions concerning the Stilwell order could by any possibility arise, and they are: 1. The fact that, in said transactions, the bank dealt entirely and solely with Robbins; 2. That the bank at no time in or during the several negotiations involving said order consulted the plaintiff or gave him any information with respect to those transactions. But we know of no rule of law which required

the bank, under the circumstances as disclosed by the findings, to inquire of the plaintiff whether Robbins's acts concerning said order and the money finally received thereon were sanctioned by him or not. The order and the money constituted the property of a copartnership of which Robbins was a member. He had the legal right to deal with the order and the money and to dispose of them, even to the satisfaction of his individual indebtedness, if that course were sanctioned by the plaintiff. And there is nothing in the mere fact that he did so dispose of the order and the money that would be sufficient to generate in the bank even a suspicion, much less a substantial reason to believe, that thus he was acting in bad faith with his partner or attempting wrongfully to appropriate or divert the property to his own individual purposes, to the detriment of his partner. Of course, we do not mean to say that one partner has the right to misappropriate the partnership property or funds, for he has no such right, and where he does do so, the other partner has, as is well illustrated by this case, his redress against the defaulting member of the firm for the wrong so committed. But what we do say is (to repeat) that where a partner is dealing with a third party respecting partnership money or property, the latter has the right to assume that such partner is acting in perfect good faith toward and with full authority from his partner or partners with regard to the transaction, and that, because it may appear that the transaction, when consummated, will redound solely to the benefit of the partner conducting it, constitutes no ground for the implication of fraud on the part of such partner upon the other partners in thus disposing of or handling the partnership assets. There is, therefore, in this case nothing in the mere transactions themselves relating to the Stilwell order which would tend to suggest to the bank fraudulent conduct of Robbins in said transactions toward the plaintiff, and hence there was no obligation cast upon the bank by the mere transactions themselves to prosecute an inquiry, before the consummation of the transactions, to ascertain whether they were authorized or sanctioned by the plaintiff, or, if carried out, they might or would work a fraud upon the partnership rights of the plaintiff.

But the fact is emphasized that the findings disclose that the bank communicated to Robbins alone the proposal of Bowers to take up the Stilwell order, furnishing the plaintiff

with no information relating thereto; that the bank, so it is asserted, loaned Robbins the five hundred dollars with which he purchased the interest of the plaintiff in the Stilwell order; that the bank made false statements to the plaintiff concerning the payment by Bowers of the note given by him in exchange for the Stilwell order, after that transaction had been consummated, for the purpose of circumventing discovery by the plaintiff of the fraud of which said note was one of the consequences. These facts, it is vigorously urged, disclose that the bank had knowledge of the fraudulent character of the several transactions, and that they, reinforced by the fact of the unauthorized pledge of the Stilwell order to the bank as security for Robbins's individual indebtedness to it, are sufficient to destroy the force or impeach the legal integrity of the ultimate finding exonerating the bank from any fraudulent participation in the transactions culminating in the fraud upon the plaintiff.

As to the first of the propositions thus advanced, it is in the first place to be observed, as in effect we have before declared, that there was no legal or moral duty resting upon the bank to inform the plaintiff of the offer of Bowers to take up the Stilwell order as indicated. So far as the findings disclose the circumstances of that transaction, there is nothing therein indicating but that, so far as the bank had any knowledge on the subject *at the time of Bowers's offer and its acceptance by Robbins and the bank*, the plaintiff had been given information of and acquiesced in it. Indeed, so far as it appears to the contrary, at the time of the acceptance of Bowers's offer by Robbins, the bank was justified in assuming that that transaction was known and agreeable to the plaintiff, it having been accepted by his partner. In the second place, the court does not find (see finding 8, *supra*) that the bank communicated to Robbins the offer made by Bowers. What the court does find is, as will be noted, that Bowers made an offer to purchase from the bank the securities, including the Magnesite Company's note, pledged by Stilwell to the bank, and also to give his note for and in lieu of the Stilwell order to Robbins & Breeze, and that the bank and Robbins accepted the offer. Whether, as to the order, the offer was made both to Robbins and the bank or to Robbins alone, cannot be determined from the finding, but it may be assumed that, since the bank was interested in the order as a pledge to secure Rob-

bins's indebtedness to it, the offer as to said order was made to the bank as well as to Robbins, still this fact alone constitutes no evidence of fraud or, if there was fraud at the bottom of Robbins's connection with the offer and its acceptance so far as they concerned the order, that the bank knew of it or had any reason to believe the transaction to be so tainted. It is true that the finding declares that neither Robbins nor the bank at any time communicated to the plaintiff information concerning the offer and the acceptance thereof, but it obviously cannot be concluded from that fact that the bank, at the time of the execution of the transaction or when the offer was made, had knowledge or reason to believe that the plaintiff had not been fully apprised of the proposition by his partner, Robbins.

The statement by the plaintiff that the bank loaned to Robbins the money wherewith he bought his interest in the Bowers note is not supported by the record. The finding as to that circumstance is, as will be perceived, that, while W. H. High, the manager of the bank, performed the physical act of delivering it to the plaintiff, said money was in point of fact loaned to Robbins by his father. But it is urged that said finding must be disregarded for the reason, so it is asserted, that the denial by the bank in its answer that it loaned the money paid by Robbins for the plaintiff's interest in the note is so phrased as to carry with it an admission that the bank did make the loan of said money to Robbins—that is, that said denial involves a negative pregnant. Upon this appeal, however, it being on the judgment-roll alone, that point cannot be of any avail to the plaintiff. Presumptively, the question whether the bank did or did not advance the five hundred dollars, or any part thereof, to Robbins under any circumstances was treated as an issue at the trial and, presumptively, there was sufficient evidence to support the finding upon that issue. (*Peck v. Noes*, 154 Cal. 351, 354, [97 Pac. 865].) But, even if it were true that the bank loaned the money to Robbins to be used for the purpose of buying Breeze's interest in the order, it is clear that that circumstance would not tend to show that the bank was thereby guilty of fraud in the transaction, since there is no finding that the bank had knowledge of the purpose for which the money was to be used. But the court did expressly find that the bank had no knowledge at any time prior to the twelfth

day of April, 1907, that the plaintiff had not received from Robbins for his interest in the order a consideration in addition to the said sum of five hundred dollars.

The charge that the bank, after the purpose of the fraud had been accomplished, made false statements to the plaintiff with a view to forestalling and preventing discovery by him of the fraud, is not borne out by the findings. The only finding bearing upon that proposition is finding No. 16, and therein the court finds, as will be observed, that the plaintiff, having for the first time on the sixth day of May, 1907, discovered that the Stilwell order had been paid by Bowers, at once made inquiry of both Robbins and the bank whether or not Robbins knew that Bowers was going to pay the order before the plaintiff had sold and assigned his interest in said order to Robbins, and that both Robbins and the bank denied that Robbins had knowledge of such fact before the time when plaintiff made such assignment. There is no statement to be found in the findings that the bank deliberately made a false statement to the plaintiff as to Robbins's knowledge of Bowers's intention to pay the Stilwell order or his note given in lieu thereof at or before the time that the plaintiff assigned his interest in said order to Robbins. For all that appears to the contrary from the findings, the bank might have in good faith believed that Robbins had no such knowledge at the particular time referred to. Besides, whether the bank did or did not make a false statement with regard to that matter involved a question of evidence, and whether the circumstance, even if true, possessed great or little or no significance in support of the charge of fraud against the bank, constituted a proposition the solution of which was solely with the trial court.

While thus we have taken the pains to show that there is no real inconsistency between the probative and the ultimate facts found by the court, it has been an unnecessary task, since, as before stated, and as is plainly manifest from an examination of the findings, the ultimate fact is not drawn from the findings of probative facts or in any degree dependent upon them.

From the views of the findings above expressed, it results that upon this appeal from the judgment upon the judgment-roll alone, the finding that the bank had no hand or took no part in the fraudulent acts by means of which the plaintiff

was wrongfully deprived of his interest in the Stilwell order can rest upon the presumption, which must be indulged when the appeal, as here, is not supported by a bill of exceptions or statement or other duly authenticated record of the evidence, that there was received into the record evidence sufficient to justify and support it.

There is, however, another point made by the plaintiff of which brief notice only is required. It is contended by him that Robbins held the plaintiff's interest in the Stilwell order as a constructive trustee for the plaintiff, inasmuch as Robbins obtained said interest through fraud; that, this being so, the plaintiff is entitled to follow and recover from the bank the money received into its hands from the sale of the plaintiff's interest in the order, since, so the argument proceeds, the bank, notwithstanding that it might have been a purchaser thereof in good faith and without notice, was not a purchaser for value, inasmuch as it applied the money so obtained to the payment of a pre-existing indebtedness. The contention is that the satisfaction of a pre-existing indebtedness, owing to the vendee, does not constitute a valuable consideration. As upholding that contention, plaintiff cites a number of cases from other jurisdictions. Precisely what the cases referred to hold upon that proposition we need not here pause to inquire, for, whatever may be the rule elsewhere, it is firmly settled by our own decisions that the cancellation of an antecedent debt, due the vendee from the vendor, for the sale of property, does constitute a valuable consideration. (See the following cases: *Payne v. Bensley*, 8 Cal. 266, [68 Am. Dec. 318]; *Robinson v. Smith*, 14 Cal. 98; *Naglee v. Lyman*, 14 Cal. 454; *Frey v. Clifford*, 44 Cal. 342; *Davis v. Russell*, 52 Cal. 611, [28 Am. Rep. 647]; *Sackett v. Johnson*, 54 Cal. 107; *Gassen v. Hendrick*, 74 Cal. 444, 446, [16 Pac. 242]; *Foorman v. Wallace*, 75 Cal. 552, [17 Pac. 680]; *Russ v. Muscupiabe*, 120 Cal. 521, [65 Am. St. Rep. 186, 52 Pac. 995].)

In *Naglee v. Lyman*, 14 Cal. 454, the court, expressing its views through Mr. Justice Field, said: "All the authorities, however conflicting in other respects, concur in the rule that where there is change in the legal rights of the parties in relation to the antecedent debt, the creditor taking the collateral security is considered as a holder for value, and the paper not subject to equities existing between the original parties"—that is to say, where the creditor so takes such

security in ignorance of the existence of such equities.

All the other cases above cited to this point confirm and reaffirm the rule as it is thus stated.

Our conclusion is that the judgment should be affirmed, and it is so ordered.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1311. Third Appellate District.—September 12, 1914.]

JOHN HOPS, Petitioner, v. A. W. POE, Respondent.

INTOXICATING LIQUORS—LOCAL OPTION ELECTION—RESUBMISSION OF QUESTION AFTER TWO YEARS—COMPUTATION OF TIME.—The provision of the Local Option Law (Stats. 1909, p. 599) that no election shall be held under the act "within two years of any previous election" thereunder in the same territory, means that if the question is submitted at a special election, the sense of the electors cannot again be taken on the proposition until two years of three hundred and sixty-five days each have passed, but if the first vote is taken at a general election on the first Tuesday after the first Monday in November, another vote may be taken at the next general election on that day the second year following, although the first election was on November fifth and the second one will be on November third, leaving an interval of less than two years of three hundred and sixty-five days each.

ID.—MEANING OF WORD "YEAR" IN ELECTION STATUTES.—When the statute uses the term "year" in connection with general elections, the political year is clearly contemplated, but in referring to special elections, since no particular day is specified, the intention is to designate the year of three hundred and sixty-five days.

ID.—WORD "YEAR"—WHETHER WORD MAY MEAN LESS PERIOD THAN THREE HUNDRED AND SIXTY-FIVE DAYS.—While the word "year," when used in a statute, ordinarily means a period of three hundred and sixty-five days, still its meaning is, in all cases, dependent upon the subject matter and the connection in which it is used, and it may stand for a period of time less than three hundred and sixty-five days.

APPLICATION for Writ of Mandate to be directed to the County Clerk of Calaveras County.

The facts are stated in the opinion of the court.

Ben Berry, for Petitioner.

Will A. Dower, for Respondent.

BURNETT, J.—This is an application for a writ of mandate to require respondent, who is the county clerk of Calaveras County, to file a petition for an election to determine whether the sale of alcoholic liquors shall be licensed in the fifth supervisorial district of said county. There is no question raised as to the sufficiency of said petition or that it was executed with the formality required by the statute, but respondent claims that to file said petition at this time would require an election to be had on the proposition at the approaching general election on November 3, and that this election would be illegal by reason of the fact that the same question was submitted at the last general election held November 5, 1912, less than two years prior to said November 3.

Section 4 of "An act to provide for the regulation of the traffic in alcoholic liquors by establishing local option" (Stats. 1909, p. 599) directs the clerk within ten days after filing such petition, if he is satisfied it is signed by the requisite number of qualified electors, to so certify in writing and, furthermore, said section provides: "If the petition shall be certified as sufficient, the legislative or governing body having jurisdiction over the territory described therein shall within the time prescribed herein call an election to be held in such territory to vote upon the question whether the sale of alcoholic liquors shall be licensed therein," and section 6 provides: "If said petition shall be certified as sufficient within six months and not less than forty days before the holding of the next general state or general municipal election within the territory therein described such question shall be submitted at said general state or general municipal election; otherwise a special election to vote upon the question shall be called to be held within not less than thirty nor more than sixty days after the petition has been certified as sufficient; *provided*, that no election under this act shall be held within two years of any previous election held under this act within the same territory."

It thus appears that if respondent had filed the petition as requested on July 29, 1914, it containing the requisite names, he would have been required to certify it within ten days there-

after and said date being within six months and not less than forty days before the holding of the next general election, it would follow from the statute that such question should be submitted at that time. The vital point in the contention of respondent is thus shown to be that the interval of time between the general election of 1912 and that of 1914 does not constitute the period of two years. Going one step further, he claims that since an election if had upon the question on November 3 would be illegal, it would be an idle and futile act for respondent to file said petition within said period specified as above.

It may be doubted whether the respondent, being a mere ministerial officer, is in a position to urge such defense to justify him in his refusal to file said petition, but the materiality of the defense, if sound, is conceded by petitioner, so we proceed to inquire whether there would be any infraction of the law if the supervisors should require the same question to be submitted again at the approaching general election.

It is to be observed that the statute contemplates that the question may be submitted at a general or a special election. In either event, the interval must be at least two years. This, of course, is to secure reasonable permanency and to avoid unnecessary expense. The policy of the law is plain and salutary. The statute should be construed so as to give effect to this manifest and wholesome purpose. If the question is submitted at a special election no one, of course, would contend that the sense of the electors could again be taken on the proposition until two years of 365 days each had passed, but where the first vote is taken at a general election, which occurs on the first Tuesday after the first Monday in November, we think the more reasonable and beneficent interpretation of the law justifies and demands the conclusion that another vote may be taken at the next general election to be held on the first Tuesday after the first Monday in November of the second year following. In other words, when the statute uses the term "year" in connection with general elections, the political year is clearly contemplated, but in referring to special elections, since no particular day is specified, the legislature intended to designate the year of 365 days.

Ordinarily, the term *year* when used in a statute means a period of 365 days. (Pol. Code, sec. 3257.) "But its meaning in all cases is dependent upon the subject matter and the

connection in which it is used, and it may mean a period of twelve months, beginning on a day other than the first of January, or it may mean a political year or a period between two elections, a year of office, a school year, a fiscal year or excise year, a year of age or a theatrical season." (38 Cyc. 310.)

As far as this case is concerned for the purpose of determining the question before us we may consider the statute as though no provision were made for a special election. We may also incorporate into the statute the date of the general state election which is fixed by law. No additional element is thereby injected into the provision in question, but the legislative intent may be made more apparent. The statute would then read: "If said petition shall be certified as sufficient within six months and not less than forty days before the holding of the next general state election on the first Tuesday after the first Monday in November within the territory therein described, such question shall be submitted at said general state election . . . provided that another election on the same question shall not be had within two years thereafter." If the foregoing were the only provision it would probably not be seriously contended that four political years must elapse before another election could be held, although the second general election should occur two days less than two calendar years from the first election. But we do not see that the problem is complicated by the additional provision as to special elections as we are dealing with the term *two years* as applying only to general elections.

It may be said that the only cases in point cited by counsel uphold petitioner's contention.

In *McNeely v. Commissioners of Town of Morganton*, 125 N. C. 375, [34 S. E. 510], the statute authorized an election on the first Monday in May to determine whether or not license should be granted in the town of M. for the sale of spirituous liquors by small measure. The act further provided for a resubmission of this question every two years and it seems that an election was held on the first Monday in May, 1897, and another in 1899, but the first Monday in May, 1899, came two days earlier in the month than in 1897. It was therefore contended that two years had not passed, but the supreme court of North Carolina said: "But the act provided for the election to be held on the first Monday in May—the

same day of election for municipal officers. We think this controls the time. It is like electing members of the legislature every two years—elections to be held on the first Tuesday in November, which may not be precisely two years if we count the days. In fact, the legislature has changed the time of this election from November to August, and, if the plaintiff's contention should be sustained, it would invalidate the election."

Battle Creek Brewery Co. v. Supervisors, 166 Mich. 52, [Ann. Cas. 1912D, 946, 131 N. W. 160], involved the construction of the Local Option Law of that state providing that the license question should be submitted at the time of the general election and containing this provision: "*Provided, however, that such proposition having been once submitted and decided either way by a majority of the votes of the qualified electors in any county in this state, voting thereon, the same shall not be again submitted in such county within a period of two years next thereafter, but may, at any time after the expiration of such period, upon a like petition and action, be again submitted, and so on, at the expiration of not less than two years after every such election.*"

It seems that one vote was taken at the general election held April 5, 1909, and the question was again submitted at the general election held April 3, 1911. And it was contended there, as here, that the two years had not expired, two days being lacking. One of the justices agreed with that contention, declaring the election to be void and basing his construction of the law upon the rule of interpretation provided by the statute of that state: "In the construction of the statutes of this state, the following rules shall be observed, unless such construction should be inconsistent with the manifest intent of the legislature: The word 'month' shall be construed to mean a calendar month and the word 'year' a calendar year." The opinion of the court, however, concurred in by all the other justices, was as follows: "The period of two years mentioned in the proviso to section 5420 is to be interpreted in connection with the amendments fixing the date of the election at the date of the general election for township officers, etc., and the law is to be construed as though the amendments were part of the original act. It was manifestly the intention of the legislature that the result of the election should not be disturbed for two years; not that it should be final for two

years at times and three years at other times, as the time between the first and third general elections might be two years or a day or two less than two years. I am therefore of the opinion that the two years referred to are political years, and not calendar years. (*Inhabitants of Paris v. Inhabitants of Hiram*, 12 Mass. 281; *McNeely v. Commissioners of Morganton*, 125 N. C. 375, [34 S. E. 510].)"

The only substantial difference between the statutes thus construed in the two foregoing cases and the one before us is that here the question may also be submitted at a special election. The interests of the people, however, demand, and no doubt it was the intention of the legislature, that as far as practicable the question should be submitted at the general election, and in such case we can see no good reason why it should not be held that it is fully two years from one general election to another.

Harrison v. Roberts, 145 Cal. 173, [78 Pac. 537], was clearly a different case. There the first vote was taken at a special election held December 4, 1902, and the second proposed vote was to be taken at the general election to be held November 8, 1904, and it was justly held that between these two dates the period was not two years—the matter relating to proposed amendments to the charter of San Francisco.

We think it a reasonable construction of the statute and in the interests of the taxpayers to hold that the clerk should file the petition, and it is so ordered and, in accordance with the stipulation of the parties, the *remittitur* will issue forthwith.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 337. Second Appellate District.—September 14, 1914.]

THE PEOPLE, Respondent, v. OTHO J. HOGE, Appellant.

CRIMINAL LAW—CONFESSION BY PRISONER—THREATS MADE OR INDUCEMENTS HELD OUT BY OFFICERS OF LAW.—A confession extorted by threats or resulting from inducements held out by the officers of the law to a prisoner in their custody is not admissible in evidence; and when a confession is offered in a criminal case, it is incumbent on the prosecution to lay the foundation for its introduction

by preliminary proof showing *prima facie* that it was freely and voluntarily made.

ID.—CONFESSION TO OFFICERS—ADMISSIBILITY WHEN VOLUNTARILY MADE.—But the mere fact that a person accused of crime is under arrest and in the custody of officers, and makes a confession in answer to questions, will not warrant the rejection of the confession if it fairly and clearly appears that the statements therein are of a voluntary nature.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Wm. D. Dehy, Judge presiding.

The facts are stated in the opinion of the court.

Frank A. McDonald, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

CONREY, P. J.—Appellant herein was convicted of the crime of robbery. He appeals from the judgment and from the order denying his motion for a new trial.

If the testimony hereinafter mentioned was properly admitted, that testimony, together with the other evidence in the case, is sufficient to support the verdict. The only question requiring attention on this appeal relates to the admissibility of an alleged confession by the defendant.

According to the testimony of witnesses for the prosecution, the defendant, on the eighth day of November, 1913, was under arrest at the city jail of the city of Los Angeles charged with the offense in question. The defendant was taken to the office of the witness Flammer, the captain of detectives, and the alleged confession was made in the presence of Mr. Flammer and police officers Williams and Winn and the witness Wright, a shorthand reporter. The testimony shows that questions were asked of the defendant by Mr. Flammer and that the defendant did not hesitate in answering the questions, and that no threats or promises were made to induce him to make those answers.

The substance of the admissions made was that the defendant bought a revolver and gave it to one Kennedy and arranged with Kennedy that Kennedy would come to a room occupied by the defendant and one Cibulski and rob Cibulski, at the same

time pretending to take money from the defendant. Kennedy carried out this plan and obtained fifty dollars from Cibulski.

Flammer further testified, as witness for the defendant, that before the reporter came into the office there had been a conversation of a few minutes between the defendant and the three officers; that in that conversation the defendant "admitted that he did frame up this hold-up and had it carried out; and then he answered those questions freely. It was an ordinary conversation." That in this first conversation the defendant answered the questions freely and did not hesitate. The witness Williams, as witness for the defendant, testified that the defendant said that "he wanted to tell us all about it."

The rule is well established that a confession extorted by threats or resulting from inducements held out by the officers of the law to a prisoner in their custody is not admissible in evidence; that when such a confession is offered in a criminal case it is incumbent on the prosecution to lay the foundation for its introduction by preliminary proof showing *prima facie* that it was freely and voluntarily made. (*People v. Soto*, 49 Cal. 67.) But the mere fact that the defendant is under arrest and in the custody of officers and that the alleged confession is made in answer to questions, will not authorize the rejection of such confession, if it fairly and clearly appears that the statements of the defendant were of a voluntary nature. The case at bar stands in strong contrast with those of *People v. Quan Gim Gow*, 23 Cal. App. 507, [138 Pac. 918]; *People v. Borello*, 161 Cal. 367, [37 L. R. A. (N. S.) 434, 119 Pac. 500], and *People v. Loper*, 159 Cal. 6, [Ann. Cas. 1912B, 1193, 112 Pac. 720].

The judgment and order denying a new trial are affirmed.

James, J., and Shaw, J., concurred.

[Crim. No. 834. Second Appellate District.—September 14, 1914.]

**THE PEOPLE, Respondent, v. MIJO VUKOJEVICH,
Appellant.**

APPEAL—ORDER DENYING NEW TRIAL—PRESUMPTION AS TO CORRECTNESS.—On an appeal in a homicide case from an order refusing a new trial it will be presumed that the ruling was correct where neither the grounds upon which the motion was based nor the affidavits of newly-discovered evidence are incorporated in the record.

ID.—AFFIRMATIVE SHOWING OF ERROR—DUTY OF APPELLANT TO MAKE.—It devolves upon an appellant to show the existence of error. In the absence of such showing the appellate court, in accordance with the rule that all intendments are in favor of the regularity of the proceedings, will indulge the presumption that the ruling of the trial court complained of was correct.

ID.—CONFLICT OF EVIDENCE—PROVINCE OF APPELLATE COURT.—Appellate courts cannot and will not, where a substantial conflict of evidence exists, determine the credit which should be accorded witnesses, or attempt to weigh their testimony.

HOMICIDE—SUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION.—In this prosecution for murder the evidence is sufficient to support the verdict of guilty, though no witness testified to actually seeing the defendant inflict the fatal wound.

ID.—DYING DECLARATION—SENSE OF IMPENDING DEATH.—In such prosecution a declaration of the deceased to the effect that the defendant had killed him, made within one or two minutes before his death from the wound inflicted upon him, is admissible in evidence as having been made "under a sense of impending death."

ID.—PROOF THAT DECLARATION WAS MADE UNDER SENSE OF IMPENDING DEATH.—To constitute proof that a declaration was made under sense of impending death, it is not necessary that the deceased should have expressed in words the belief that he was about to die; it is enough if it satisfactorily appears in any mode that the declaration was made under that sanction.

ID.—OPINION OR CONCLUSION—WHETHER DECLARATION CONSTITUTES.—A statement made by a wounded man immediately preceding dissolution, that the defendant killed him, is not the expression of an opinion or conclusion.

ID.—MISCONDUCT OF COURT TOWARD WITNESS—WHETHER PREJUDICIAL. For a trial judge in a homicide case to tell a witness to "shut up," and to use no "more profane language or you will get in jail," is not reversible error.

ID.—COURTESY OF COURT TOWARD WITNESS—REVIEW ON APPEAL.—The degree of courtesy to be exercised by the trial court toward a wit-

ness is not a subject for judicial review, unless it clearly appears that the defendant's rights were prejudiced thereby.

ID.—INSTRUCTIONS—REFUSAL TO GIVE—REVIEW ON APPEAL—Alleged error in refusing to give certain instructions to the jury cannot be considered on appeal, in the absence of anything in the record showing that the defendant requested the court to give any instructions.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

Frank A. McDonald, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

SHAW, J.—Defendant and two others were charged with the crime of murder. Upon a separate trial defendant was convicted of the crime of manslaughter. He appeals from the judgment and an order denying his motion for a new trial.

A sufficient answer to the appeal from the order denying the motion for a new trial is that the grounds upon which the motion was based are not disclosed by the record; neither are the affidavits of newly-discovered evidence referred to in appellant's brief, incorporated therein. It devolves upon appellant to show the existence of error. In the absence of such affirmative showing this court, in accordance with the rule that all intendments are in favor of the regularity of the proceedings, will indulge the presumption that the ruling was correct.

All of the parties involved were Slavonians. It appears that on the afternoon of October 5, 1913, the attention of deceased, whose name was Charles Rezo, and several companions, all of whom were at the time in a house known as No. 114 Leroy Street in Los Angeles, was attracted by the report of fire arms at No. 118 on said street. Deceased left the house, followed by several others, going toward the house No. 118, at which time defendant, accompanied by several companions, all or most of them being armed with knives and pistols, met the party of deceased coming from No. 114, and a general fight,

accompanied by much neighborhood excitement, ensued. In the affray Charles Rezo was almost instantly killed by a knife wound which pierced the pulmonary artery. According to the theory of the prosecution, this knife wound which caused the death of Rezo was inflicted by defendant, and it is apparent from the verdict rendered that the jury were satisfied as to the correctness of such theory.

Counsel for defendant has filed a voluminous brief of nearly one hundred pages, wherein he attacks the sufficiency of the evidence to justify the verdict. In his zeal in this behalf he not only quotes at great length the evidence pro and con given by the numerous witnesses, pointing out discrepancies therein which he insists render certain testimony given for the prosecution unworthy of credence and without weight, but not content with so doing, produces what he claims to be the testimony of a witness given in another trial of one of the parties jointly charged with defendant, and by comparing it with the testimony of the same witness given in this case, attempts to show inconsistencies therein. If any question can be deemed settled law in this state it is that the appellate courts cannot and will not, where a substantial conflict of evidence exists, determine the credit which should be accorded witnesses, or attempt to weigh their testimony. It indeed appears useless to cite authorities in support of the proposition that under such circumstances no question of law is presented for review. In this case appellant, by pointing out the alleged discrepancies, concedes a substantial conflict in the evidence which, he says, renders it unsatisfactory. What is said in *People v. Haydon*, 18 Cal. App. 543, [123 Pac. 1102, 1114], is peculiarly appropriate in this case; "If, therefore, every case taken to the appellate courts were to be reversed because of discrepancies or contradictions in the testimony of witnesses without whose testimony a verdict of a jury or the findings of a court could not be sustained, there would, indeed, be few cases in which a reversal would not be compelled upon the ground of the insufficiency of the evidence to support such verdict or findings. . . . It is for this reason that our constitution provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved. . . . In consonance with the spirit and intent of this constitutional provision, the legislature has

ordained that the jury are the exclusive judges of the credibility of witnesses (Code Civ. Proc., sec. 1847) and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates." While the record fails to show that any witness actually saw defendant inflict the fatal wound, it does show that defendant with another had deceased down at which time defendant, with a gun in one hand and a knife in the other, was on top of Rezo striking him with the gun; that he was pulled off of Rezo, when the latter got up, staggered against a fence and fell in the arms of a friend to whom he stated that defendant had killed him, his death following immediately after making the statement. In addition to the testimony of two witnesses to such fact, there was other evidence and circumstances which clearly pointed to defendant's guilt. Indeed, it is difficult to perceive how the jury could have reached a verdict other than one pronouncing defendant guilty.

The chief question of law presented is the admission in evidence of the declaration made by deceased to the effect that defendant killed him. Witness Soldo, after testifying to occurrences immediately preceding the death of Rezo, stated that the latter died one or two minutes after he (the witness) asked him what was the matter with him. Thereupon he was asked: "What did Rezo say to you?" Defendant's objection that a proper foundation was not laid for eliciting the evidence, in that it was not made to appear that Rezo knew he was dying, was overruled and the witness stated that deceased, while lying in his arms, replied that "Mike Vukojevich (the defendant) and Grgo Vukojevich have killed me." Appellant insists that it was not made to appear that the declaration was made "under a sense of impending death," in the absence of which showing the statement was inadmissible. (Code Civ. Proc., sec. 1870, subd. 4.) To constitute proof of such fact it was not necessary that deceased should have expressed in words the belief that he was about to die. Says Mr. Greenleaf, in regard to the mode of establishing the necessary fact: "It is enough, if it satisfactorily appears, in any mode, that they (the statements) were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, . . . or from his conduct, or other circumstances of

the case, all of which are resorted to, in order to ascertain the state of the declarant's mind." (1 Greenleaf on Evidence, sec. 158.) The evidence of a physician called as a witness was that such a wound as that inflicted upon deceased must necessarily result in immediate death. The testimony showed that death ensued from one to two minutes after the infliction of the wound. The evident danger of such a wound, followed by its immediate fatal effect upon the victim, was a strong circumstance tending to show that he knew his condition. (*People v. Ybarra*, 17 Cal. 169.) The statement made immediately preceding dissolution that defendant had killed him was not the expression of an opinion, nor a conclusion (*State v. Saunders*, 14 Or. 300, [12 Pac. 441]; *State v. Gile*, 8 Wash. 12, [35 Pac. 417]), but was equivalent to saying that defendant had inflicted the fatal knife wound which caused his death, and the use of the words "has killed me" justified the inference that deceased was cognizant of his dying condition. The evidence of Soldo in this respect was corroborated by the testimony of Mato Rezo. In our opinion, no error was committed by permitting the statement so made by deceased to be introduced in evidence as his dying declaration.

Appellant complains of alleged misconduct of the trial judge, which he insists was prejudicial to his case. This contention is based upon the following proceedings: One Ephifanos, called as a witness on behalf of the defense, testified that when the trouble started a number of men were playing pool in a billiard room which he conducted. In describing the manner in which these persons left their game, he exclaimed: "My God, they flew out and ran and leave the cue, all six tables flew. I say, what is going on?"

"The Court: I don't want you to use that language again in this court. Don't use any profane language in this court.

"The Witness: Excuse me, I don't mean—they gone out—

"The Court: Shut up, just a minute now. That seems to be the only thing that you can understand. Go ahead and tell your story, but don't use any more profane language or you will get in jail."

It is impossible to conceive how the rights of defendant could have been prejudiced by the court telling the witness to shut up, or threatening him with a jail sentence for the use of the language in which he indulged. The degree of courtesy to be exercised by the court toward a witness is not

a subject for judicial review, unless it clearly appears that defendant's rights were prejudiced thereby (*People v. Caselman*, 10 Cal. App. 234, [101 Pac. 693]); hence the language used toward the witness is no concern of defendant.

It is claimed the court erred in refusing to give certain instructions requested by defendant. There is an absence of anything in the record showing that defendant requested the court to give any instructions; hence there is no merit in the contention. (*People v. Hettick*, 126 Cal. 429, [58 Pac. 918].)

Counsel for appellant has made excerpts from the instructions given, which, thus isolated, he claims were erroneous statements of law. Instructions must be considered as a whole, each part thereof in connection with the other, and as applied to the subject matter thereof. Thus considered, the instructions given, covering upwards of twenty pages of the record, constitute a full, fair, and correct exposition of the law applicable to the facts established by the evidence. Our attention is directed to other alleged errors in rulings upon the admissibility of evidence offered. They are trivial in nature and, conceding such rulings to have been error, it is apparent that upon this record defendant could not have been prejudiced thereby.

We find no prejudicial error disclosed by the record, and the judgment and order denying defendant's motion for a new trial are affirmed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 344. Second Appellate District.—September 15, 1914.]

THE PEOPLE, Respondent, v. STEVE POLICH, Appellant.

CRIMINAL LAW—JUDGMENT—DELAY IN RENDERING—REVIEW ON APPEAL.

A judgment in a criminal case will not be reversed on appeal because it was not rendered or pronounced until seven days after the rendition of the verdict, in the absence of a motion or demand for a new trial on the ground of such delay.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Frank R. Willis, Judge.

The facts are stated in the opinion of the court.

Frank A. McDonald, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

CONREY, P. J.—The defendant having been convicted of the crime of robbery, appeals from the judgment and from an order denying his motion for a new trial.

The verdict was entered on March 27, 1914. The minutes of the court for March 31st, after showing the presentation of a motion for a new trial and the ruling thereon, state that an application for probation was entered for the defendant "and the ruling thereon and the matter of pronouncing judgment herein are continued to April 3, 1914." On April 3rd the defendant was in court with his counsel; the application of defendant was denied and the court pronounced judgment against him.

The only reason suggested for a reversal is that the judgment was not rendered or pronounced until seven days after the rendition of the verdict. This matter is controlled by sections 1191, 1202, and 1203 of the Penal Code. The general rule is that judgment must be pronounced not less than two nor more than five days after verdict, but it is further provided, among other things, that "the court may extend the time not more than twenty days in any case where the question of probation is considered, in accordance with section 1203 of this code." It is true, as suggested by defendant's attorney, that the record does not affirmatively show that the court referred the matter of probation to the probation officer for a report or that any report was made. If this report was essential under the circumstances, it will be presumed that the court proceeded regularly in the matter since the record shows nothing to the contrary. Furthermore, it does not appear that the defendant objected to the pronouncing of judgment on April 3rd, or that he demanded a new trial upon the ground that the five days' limit had expired. "If the judgment was not pronounced within the time limited, a new trial was made imperative if the defendant so desired; he became 'entitled' to it. . . . If the court should *refuse* a new trial and render judgment against the defendant after the

authorized time has passed, its action would be erroneous and the judgment would be reversed on appeal if an appeal should be taken." (*Rankin v. Superior Court*, 157 Cal. 189, 192, [106 Pac. 718].) The foregoing decision is authority for the proposition that the court had jurisdiction of this case on April 3, 1914, and that it might rightfully enter the judgment in the absence of a motion or demand for a new trial based upon the claim of delay in rendering judgment.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

[Crim. No. 504. First Appellate District.—September 16, 1914.]

THE PEOPLE, Appellant, v. JAMES GIBBS, Respondent.

CRIMINAL LAW—POLICE AND JUSTICES' COURTS—JURISDICTION OVER MISDEMEANORS.—The police and justices' courts have exclusive jurisdiction over all misdemeanors punishable by a fine not to exceed five hundred dollars or by imprisonment not to exceed six months; and, unless expressly provided to the contrary, every offense declared to be a misdemeanor is punishable by a fine not to exceed five hundred dollars or by imprisonment not to exceed six months.

ID.—PUBLIC NUISANCE—INFORMATION CHARGING—JURISDICTION TO TRY. Where a defendant is informed against under section 373a of the Penal Code, for maintaining a public nuisance, the offense falls within the category of misdemeanors which are triable only in the police or justices' courts.

ID.—SECTIONS 373a AND 377 OF PENAL CODE NOT TO BE READ TOGETHER. The information in such case cannot be sustained as within the jurisdiction of the superior court, on the theory that it charges an indictable misdemeanor, by reading and construing section 373a of the Penal Code with section 377, the latter dealing with the violations of health laws relating to the registration of deaths and the disposition of human remains.

ID.—SECTION 3491 OF CIVIL CODE—EFFECT TO CONFER JURISDICTION ON SUPERIOR COURT.—The fact that section 3491 of the Civil Code provides among other things that a public nuisance may be remedied either by an indictment or an information does not avail to confer upon the superior court jurisdiction to hear and determine an offense charged under section 373a of the Penal Code.

APPEAL from an order of the Superior Court of the City and County of San Francisco sustaining a demurrer. George H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, C. M. Fickert, District Attorney, and Louis Ferrari, Assistant District Attorney, for Appellant.

G. Gunzendorfer, for Respondent.

LENNON, P. J.—The defendant in this case in an information filed in the superior court of the city and county of San Francisco was charged with maintaining a public nuisance, in violation of the provisions of section 373a of the Penal Code.

The defendant demurred to the information upon the ground that the offense charged was a misdemeanor which the superior court did not have original jurisdiction to hear and determine. The demurrer was allowed, upon the ground stated, and the people have appealed. The demurrer was well taken and properly allowed. The police and justices' courts have exclusive jurisdiction over all misdemeanors punishable by a fine not to exceed five hundred dollars or by imprisonment not to exceed six months; and, unless expressly provided to the contrary, every offense declared to be a misdemeanor is punishable by a fine not to exceed five hundred dollars or by imprisonment not to exceed six months. (Pen. Code, secs. 19, 1425.)

Section 373a of the Penal Code, under which the defendant was informed against, expressly declares the offense defined therein to be a misdemeanor, but does not prescribe the penalty therefor. It follows necessarily that the offense charged against the defendant falls within the category of misdemeanors which are triable only in the police or justices' courts. The information in the present case cannot be sustained upon the theory that it charges an indictable misdemeanor. The contention of the people in this behalf is based upon the assumption that section 373a of the Penal Code, under which the information was drawn, may be rightfully read and construed in conjunction with the provisions of section 377 of the Penal Code. This cannot be done. The latter section

undoubtedly deals only with violations of health laws relating to registrations of deaths and the disposition of human remains. Clearly the provisions of that section have no express or implied relation to the offense defined by section 373a. Section 377 was intended to penalize only the willful omission by any person charged with a duty relating to the registration of deaths to do certain things concerning such registration and the burial of the dead. True, subdivision 5 of that section in general terms declares that the willful violation of any of the laws of this state relating to the preservation of the public health constitutes a misdemeanor which is, "unless a different punishment . . . is prescribed, . . . punishable by imprisonment in the county jail not exceeding one year or by fine not exceeding one thousand dollars"; but subdivision 5 of the section under consideration cannot be construed as a statute separate and apart from that which appears before in the section itself. The code section in question deals with but a single subject; and therefore must be construed in its entirety in order to arrive at a correct conclusion concerning its intent and purpose. When so construed, it is manifest that the violation generally referred to in subdivision 5 relates to, is covered by, and must be controlled by the provisions of the introductory paragraph to the entire section. So construed, it is evident that subdivision 5 must be understood as applying only to those persons who are charged by law with a duty relating to the registration of deaths, etc. (*Ex parte Keeney*, 84 Cal. 304, 310, [24 Pac. 34].)

The fact that section 3491 of the Civil Code provides among other things that a public nuisance may be remedied either by an indictment or an information does not avail to confer upon the superior court jurisdiction to hear and determine the particular misdemeanor charged against the defendant. The Civil Code generally, and more particularly with reference to the specific subject in mind, is but a statement of the substantive law. While section 3491 of that code very properly designates either an indictment or an information as one of the remedies which may be invoked against the maintenance of a public nuisance, nevertheless that section does not undertake to prescribe and limit the precise procedure by which the criminal remedy against a public nuisance not amounting to an indictable misdemeanor may be enforced. That this is so is evidenced by the fact that section 3492 of the same code

emphatically and unequivocally declares that "the remedy by indictment or information is regulated by the Penal Code."

It will thus be seen that the Civil Code, in keeping with its general purpose, merely states the substantive law relating to the criminal remedy which may be directed against a public nuisance, and then very properly relegates the regulation of the remedy to the provisions of the Penal Code, which, containing the adjective law, provides the criminal procedure for the prevention and punishment of crimes. If the Penal Code has omitted to provide for the prosecution by indictment or information of a public nuisance, amounting only to an ordinary misdemeanor, this court cannot supply the omission.

The order appealed from is affirmed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 1486. Second Appellate District.—September 17, 1914.]

AMY C. PUTERBAUGH, Respondent, v. F. P. McCRAY,
Appellant.

ASSIGNMENT—RIGHT TO MONEY ON ACCOUNT OF SALE OF REALTY—ORAL TRANSFER.—The right to money collected on account of the sale of real estate is subject to assignment, and the assignment may be expressed orally as well as in writing.

ID.—EQUITABLE ASSIGNMENT—REQUEST TO PAY MONEY.—The request of a husband to his debtor to pay the money to his wife constitutes an equitable assignment to her of the debt.

ID.—EXPRESS WORDS—WHETHER NECESSARY TO EQUITABLE ASSIGNMENT.—To constitute an equitable assignment no express words are necessary, if from the entire transaction it clearly appears that the intention of the parties is to pass title.

ID.—ACTION BY EQUITABLE ASSIGNEE—NECESSITY OF ALLEGING ASSIGNMENT.—Where one who is entitled to money on account of the sale of real estate makes an equitable assignment thereof to his wife before the person whom he has authorized to collect the money receives it, such person, when he thereafter obtains the money with notice of the assignment, holds it for the use of the assignee, and in her action against him for money had and received she need not allege the facts concerning the assignment.

ID.—PARTY IN INTEREST—EQUITABLE ASSIGNEE.—Where such equitable assignment is shown, the real party in interest, who should prosecute an action to recover the money, is the assignee.

APPEAL from a judgment of the Superior Court of San Diego County. W. R. Guy, Judge.

The facts are stated in the opinion of the court.

Houghton & Houghton, for Appellant.

J. C. Hizar, and Johnson W. Puterbaugh, for Respondent.

JAMES, J.—Action in form by common count for money had and received for the benefit of respondent. The amount involved was the sum of one thousand dollars. Plaintiff had judgment, from which the defendant appealed and presents the judgment-roll and a bill of exceptions.

The testimony introduced on behalf of the plaintiff (and there was none submitted in support of appellant's answer), showed that defendant held an equal interest in certain real property in the county of San Diego with the husband of plaintiff; that desiring to dispose of the same, a purchaser was found by the owners, who agreed to pay therefor the sum of seven thousand dollars; an escrow agreement was prepared and left with a title company at San Diego, together with a deed of the property signed by defendant and plaintiff's husband. The sum of four thousand dollars was paid shortly after the making of the escrow and a few months later the balance of three thousand dollars was received by the defendant who, throughout the transaction with the title company, was authorized to collect the proceeds of the sale on behalf of his co-owner as well as himself. At the time the escrow transaction was closed the husband of plaintiff instructed defendant to pay over the share of the proceeds which were received for the former, to the plaintiff, his wife, and pursuant to this agreement two thousand five hundred dollars of the first four thousand dollars received was paid over to the plaintiff. Defendant had agreed that in view of the fact that plaintiff and her husband were in need of money, he would pay over the amount mentioned, which was in excess of one-half of the sum first received, and that out of the final payment of three thousand dollars he would retain two thousand dollars and pay over one thousand dollars, which would equalize the amounts to be received by both interests. After defendant had been paid the sum of three thousand dollars

he refused to turn over any part of the same to the plaintiff, and wrote a letter to plaintiff's husband stating that he thought the circumstances warranted him in holding the amount as a sinking fund and referred to some promise made for the taking of legal action against third parties, which matter was not shown by any evidence to constitute any excuse for his failure to pay over the one thousand dollars which he had received in his capacity as a trustee. There was some slight testimony as to defendant having paid a claim made against plaintiff's husband by one Whitney, but no authority so to do was shown to have been vested in him. His entire defense as made upon this appeal hangs upon the contention that the complaint did not set forth that any assignment had been made by plaintiff's husband to the plaintiff, of the right to receive moneys collected, and that therefore, as defendant was entitled to have the action prosecuted in the name of the real party at interest, the judgment entered against him was unauthorized.

Presumptively, of course, one-half of the money collected on account of the sale of the real property belonged to plaintiff's husband. His right to that money was the subject of an assignment and there can be no doubt but that the assignment could be expressed orally as well as in writing. The request of one party to his debtor that the latter shall pay money due the former to a third party has often been held to constitute an equitable assignment of the debt. (*Brady v. Ranch Mining Co.*, 7 Cal. App. 182, [94 Pac. 85]; *Curtner v. Lyndon*, 128 Cal. 35, [60 Pac. 462].) In order to constitute an equitable assignment no express words are necessary, if from the entire transaction it clearly appears that the intention of the parties is to pass title. (*McIntyre v. Hauser*, 131 Cal. 11, [63 Pac. 69].) And where such equitable assignment is shown, the real party in interest, and who should prosecute the action, is the assignee. (*Wiggins v. McDonald*, 18 Cal. 126.) The direction by the plaintiff's husband to the defendant, and which we think was sufficient under the circumstances of the case to constitute an equitable assignment of the moneys to be collected, was given prior to the time that the defendant received the money, so that the assignment having become complete, the defendant, when the money was paid to him, received that part of it for which he was liable to account, to and for the use and benefit of the plaintiff here,

as alleged in the complaint. Under such circumstances there is no good reason why the complaint should have set forth the facts concerning the assignment. The defendant not only had notice prior to the receipt of the moneys that were to be paid over to the plaintiff, but he actually acted upon that direction and paid the first installment of two thousand five hundred dollars to her. No error is shown which requires that the judgment as entered be disturbed.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 16, 1914.

[Crim. No. 510. First Appellate District.—September 18, 1914.]

THE PEOPLE, Respondent, v. THOMAS MORAN et al.,
Defendants; THOMAS MORAN, Appellant.

CRIMINAL LAW—ACCUSED AS WITNESS—CROSS-EXAMINATION.—Where a defendant in a criminal prosecution submits himself as a witness, he is subject to the same tests for ascertaining the truth as any other witness who takes the witness stand.

ID.—PRIOR CONVICTIONS—ELICITING ON CROSS-EXAMINATION.—Where the accused in a burglary case has admitted two prior convictions upon arraignment, he may be asked on cross-examination at the trial if he has ever been convicted of a felony.

ID.—NUMBER OF PRIOR CONVICTIONS—BRINGING OUT ON CROSS-EXAMINATION.—He may also be asked, as affecting his credibility, how many times he has previously been convicted.

ID.—INSTRUCTION AS TO PURPOSE OF CROSS-EXAMINATION—FAILURE TO REQUEST.—The omission of the court to instruct the jury that the purpose of admitting the testimony with reference to prior convictions was for the sole purpose of impeachment, is not error, if the defendant has made no request for such instruction.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Edwin V. McKenzie, for Appellant.

U. S. Webb, Attorney-General, and John M. Riordan, Deputy Attorney-General, for Respondent.

KERRIGAN J.—This is an appeal from the judgment and from an order denying the defendant Moran's motion for a new trial.

The appellant together with one Stephen Burton, was charged by information with the crime of attempting to commit burglary. Upon the trial, Burton was acquitted and Moran was convicted. In the information appellant was also charged with two prior convictions, which, upon arraignment, he admitted.

During the trial Moran took the witness stand and testified in his own behalf. Upon cross-examination, over his objection, he admitted that he had previously been convicted of a felony. He now assigns as error the action of the court, overruling his objections to the questions which elicited this evidence. Having submitted himself as a witness, he was subject to the same tests for ascertaining the truth as any other witness who takes the witness stand. (*People v. Arnold*, 116 Cal. 682, [48 Pac. 803]; *People v. Martini*, 21 Cal. App. 743, [132 Pac. 1069].) His objection in this respect was therefore not well taken.

Upon further cross-examination, and in answer to the question, "How often have you been convicted of a felony?" the defendant answered "Three times." The objection that the state was confined by the information to disclosing but two convictions, having come, as it did, after the answer, was too late to preserve the point for the consideration by this court. Moreover, if, upon cross-examination, it was permissible, as going to the witness' credibility, to ask if he had ever been convicted of a felony, it would seem to follow that the witness might also be asked how often he had been so convicted, as tending to throw light upon the same point.

The court's omission to instruct the jury that the purpose of admitting the testimony with reference to prior convictions was for the sole purpose of impeachment, was not error, since the defendant made no request for such instruction. (*People*

v. *Oliveria*, 127 Cal. 376, [59 Pac. 772]; *People v. Winthrop*, 118 Cal. 85, [50 Pac. 390].)

No error was committed by the court in its instructions to the jury. The instructions of the court upon the subject of intoxication were not inconsistent, and correctly stated the law upon the subject. (*People v. Young*, 102 Cal. 411, [36 Pac. 770]; *People v. Dowell*, 141 Cal. 493, [75 Pac. 45].)

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

[Civ. No. 1370. First Appellate District.—September 19, 1914.]

INTERNATIONAL TEXTBOOK COMPANY, Appellant, v.
HAROLD C. HOLMES, Respondent.

CLAIM AND DELIVERY—FINDING FOR DEFENDANT ON PARAMOUNT ISSUE—
MATERIALITY OF OTHER FINDINGS.—In an action of claim and delivery by a foreign corporation to recover the possession or value of certain books a finding that the defendant is not guilty of the conversion charged is a finding upon the paramount issue which in itself disposes of the case on its merits and supports an ultimate judgment for the defendant. Hence a further finding as to the value of the property in suit is immaterial and unnecessary, and a contention by the plaintiff that it is contrary to the evidence becomes unavailing.

Id.—ACTION BY FOREIGN CORPORATION—EFFECT OF NONCOMPLIANCE WITH
LAW.—For the same reason another finding that the plaintiff had not the legal right to maintain the action, because of noncompliance with the law requiring it to file a copy of its articles with the secretary of state, may be ignored.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. O. Moncur, Judge presiding.

The facts are stated in the opinion of the court.

Lew B. Douglass, and Alexander & O'Donnell, for Appellant.

H. U. Brandenstein, for Respondent.

LENNON, P. J.—The plaintiff in this action is a foreign corporation doing business in this state. The business of the plaintiff is that of teaching students by the correspondence method. The appeal was prepared and perfected under the new or alternative method from a judgment rendered in favor of the defendant in an action of claim and delivery wherein the plaintiff sought to recover the possession or the value of a certain lot of books. The books in controversy were delivered to various students of the plaintiff in the state of California, under the terms and conditions of a written contract. Subsequently the books were found in the possession of the defendant. The plaintiff's complaint proceeded upon the theory that the possession of the books in question by the students was the plaintiff's possession, and alleged that the defendant wrongfully and unlawfully took the books from the possession of the plaintiff and refused to return the same upon demand. The answer of the defendant denied the tort and pleaded in abatement the plaintiff's noncompliance with the provisions of the Civil Code which require that before a foreign corporation may maintain a suit or action in any of the courts of this state, it must file with the secretary of state a certified copy of its articles of incorporation and a designation of a person upon whom process may be served. (Civ. Code, secs. 405, 408, 410.)

The judgment-roll is accompanied by a special and limited transcription of the evidence taken upon the trial, that is to say, the transcript purports to show only so much of the evidence received upon the trial as relates to and bears upon two findings of the court below;—namely, the finding sustaining the defendant's plea in abatement and the finding declaring that the property in suit had no value beyond its market value. But two points are made in support of the appeal; and they are:—1. That the finding of value is contrary to the evidence; and, 2. That the lower court erred in its conclusion of law that the plaintiff had no legal capacity to sue in this state because of the undisputed fact that it had failed to comply with the provisions of section 405 et seq. of the Civil Code. The condition of the record before us renders the two points stated unavailing to the plaintiff. In the first place, it is doubtful if the record shows any evidence to the effect that the books in question had a special value. In any event, the evidence upon that phase of the case is in substantial conflict

and for this reason, if for no other, the finding must stand. But, aside from these considerations, the record shows a further finding to the effect that the defendant was not guilty of the conversion charged. The latter finding is not assailed. Obviously the latter finding presents the paramount issue in the case; that is to say, it is a finding upon an issue which in itself disposes of the case upon its merits, and having been made in favor of the defendant the further finding as to the value of the property in suit was immaterial and unnecessary. (*Rosewarn v. Washington Gold Mining Co.*, 84 Cal. 219, [23 Pac. 1035].) The paramount finding in the case is sufficient to support the ultimate judgment rendered in favor of the defendant; and therefore the conclusion of law that the plaintiff had not the right to maintain the action may be ignored. (*Spencer v. Duncan*, 107 Cal. 423, [40 Pac. 549]; *Lange v. Waters*, 156 Cal. 142, [103 Pac. 889].)

The judgment appealed from is affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 18, 1914.

[Civ. No. 1481. First Appellate District.—September 21, 1914.]

J. W. McEVERS, Petitioner, v. THOMAS F. BOYLE, as Auditor of the City and County of San Francisco, Defendant.

PUBLIC OFFICER—PREVENTION OF PERFORMANCE OF DUTIES BY INJUNCTION—VACANCY IN OFFICE.—A vacancy in the office of city sealer of weights and measures does not result, under subdivision 7 of section 996 of the Political Code, by his ceasing to perform all official duties for over three months, where, during that period, he is restrained from performing any official act by an injunction, and another action is pending in which the validity of the ordinance creating the office is upheld by the supreme court on appeal. The cessation of duties which will create a vacancy under the statute must be voluntary.

- ID.—ABANDONMENT OF OFFICE—SURRENDER OF PARAPHERNALIA.**—The fact that, during the pendency of the injunction, such officer surrenders the paraphernalia of the office to the city on demand and on being informed that the city will no longer pay the rental of his office, does not show an abandonment of the office. Neither does a letter from the officer to the mayor, referring to the “re-establishment” of the office upon the dissolution of the injunction.
- ID.—VALIDITY OF ORDINANCE CREATING OFFICE—DETERMINATION BY COURT—FAILURE OF OFFICER TO RESUME DUTIES.**—The failure of the officer to take up the duties of his office as soon as the announcement of the decision by the supreme court in the case upholding the validity of the ordinance creating the office, does not show an intention on his part to consider the office vacant.
- ID.—MANDAMUS TO PAY SALARY—EXISTENCE OF FUND.**—In *mandamus* proceedings to compel the city auditor to issue warrants for the salary of such officer and his deputies for the restrained period, it is immaterial whether there are funds in the treasury applicable to the payment of the warrants.
- ID.—SPECIFIC FUND FOR PAYMENT OF SALARY—MERGER IN GENERAL FUND.**—If money appropriated to pay such salaries has been merged in the general fund at the end of the fiscal year, it will be presumed that the specific fund still exists and is applicable to the payment of the warrants.

APPLICATION for a Writ of Mandamus directed to the Auditor of the City and County of San Francisco.

The facts are stated in the opinion of the court.

Pemberton & Pemberton, for Petitioner.

Percy V. Long, City Attorney, and Harry G. McKannay, Assistant City Attorney, for Defendant.

RICHARDS, J.—This is an original application to this court for a writ of *mandamus* directed to the defendant, as auditor of the city and county of San Francisco, commanding him to issue to the petitioner warrants to pay his official salary as deputy sealer of weights and measures, and those of certain other deputies who had assigned to him their claims therefor.

It being necessary to take testimony on the matters at issue, a reference was made to John J. O'Toole, Esq., for that purpose, and with instructions to report findings and conclusions. This has been done, the referee's findings being in favor of the

petitioner; and concluding that the writ of *mandamus* prayed for should issue.

The matter now being submitted to this court for decision, a careful examination of the testimony taken and the briefs filed convinces us that the referee's findings and conclusions are a correct determination of the matter in controversy; and we adopt as the opinion of this court the referee's opinion filed with his findings, and which is as follows:

"The above entitled matter being an original proceeding, and the following questions of fact, i. e., (1) Did the petitioner and his assignors abandon their offices. (2) Are there funds in the treasury of the city and county of San Francisco applicable to the demands of petitioner and his assignors—having arisen, and the matter having been submitted to the undersigned as referee to determine said facts, and such evidence as the parties to this action desired to offer having been taken before the referee, the matter was submitted for his decision.

"From the testimony taken and the evidence introduced it appears that Charles G. Johnson was during the month of November, 1911, and under and by virtue of an ordinance passed by the board of supervisors of the city and county of San Francisco, appointed sealer of weights and measures for said city and county, he qualified as such during said month and entered upon the discharge of his duties, and appointed petitioner herein his chief deputy, and certain of petitioner's assignors, deputy sealers, and one Rowe stenographer, all according to the terms of the ordinance. The deputies and stenographer all qualified and during the month of November, 1911, entered upon the discharge of their respective duties. An office was furnished to the sealer by the proper authorities and he was provided with certain paraphernalia and equipment necessary for the discharge of his official duties. Shortly after the appointment and qualification of the sealer and his deputies, an action was instituted in the superior court of the city and county of San Francisco, asking for an injunction restraining the sealer and his deputies from performing any official act under and pursuant to the ordinance authorizing their appointment, commanding the board of supervisors of the city and county of San Francisco to refrain from passing any demand or incurring any expense against the city pursuant to the provisions of the ordinance, and commanding the

auditor not to audit, and the treasurer not to pay any claim against the treasury of the city and county for any expense incurred in carrying out or attempting to carry out any of the provisions of the act. A temporary restraining order was granted in this action, and on or about the 8th day of February, 1912, the court announced its decision to the effect that a writ of injunction should issue as prayed for. While the judgment in this action was appealed from, the appeal was never determined, but it is conceded that *Scott v. Boyle*, decided December 12, 1912, reported at 164 Cal. 321, [128 Pac. 941], determined that the ordinance in question was valid and that the appeal in the injunction case would have been determined against the plaintiffs in that action.

"From the date of the announcement of the decision in the injunction case, the sealer, his deputies and employees obeyed the injunction, in this that they performed no official act under the ordinance. On February 8th, 1912, the sealer in a letter addressed to the mayor of the city and county asked that his deputies and employees be given a leave of absence without prejudice to their positions and without pay until the supreme court had passed upon the validity of the ordinance, and he himself offered to continue in his position without pay. On April 8th, 1912, the supervisors of the city and county denied the request. On February 19th, 1912, the board of supervisors by resolution directed its clerk to close the office which had been provided for the sealer, and to take possession of the paraphernalia. The passage of the resolution was communicated to the sealer, and on the 21st day of February, 1912, he packed and delivered to the representative of the board of supervisors, upon the demand of the latter, the paraphernalia of the office. And on the same day the representative of the board notified the owner of the building in which the sealer's office was situated, that the city would no longer pay rental for said office. Hereupon the sealer established himself at a new location, where his deputies and employees reported to him daily, and where they all, according to their uncontradicted testimony, at least made an attempt to perform some of the duties of the office, but according to their own testimony, most of their acts were unofficial. However, they took no other employment and received no compensation or salary from any other source. They filed their demands

in due form monthly with the auditor. This continued from February 21st, 1912, until December 31st of the same year.

"Counsel for defendant contends that the facts show that the office held by the sealer and his deputies became vacant on May 21st, 1912, pursuant to the provisions of section 996 of the Political Code, which provides 'That an office becomes vacant on the happening of either of the following events before the expiration of term': Subd. 7. 'His ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the state by permission of the legislature,' counsel basing his argument on the fact that the sealer voluntarily surrendered all of the paraphernalia to the representative of the board of supervisors, and thereafter performed no official act. The referee is of the opinion that the argument is not sound; it is admitted that the sealer and his deputies and employees performed their duties as provided by the statute up to the time they were restrained from so doing by the injunction issued by the superior court; this injunction for all practical purposes remained in force until December 12th, 1912, when the validity of the ordinance was determined by the supreme court in another action, but in reality the injunction was never dissolved and actually the sealer and his deputies were restrained from performing their duties until the date of their resignation. Under the circumstances, I am of the opinion that their acts, or rather their failure to act, does not bring them within the provisions of subdivision 7, section 996 of the Political Code. The ceasing to perform the duties, etc., must be a voluntary ceasing. One can well comprehend what would have been the result of any attempt on the part of the sealer or his employees to perform any of the duties of their respective offices while the injunction was in force; undoubtedly on their attempt being called to the attention of the court, the court would have placed them where the attempt could not be renewed and thereby more effectively, than by mere command, prevented a repetition of the attempt. Therefore, as long as the injunction was in force, it was their duty to obey it, and their doing so cannot be said to be such a ceasing to perform their duties as would bring them within the provisions of the section. See *Bergerow v. Parker*, 4 Cal. App. 169, [87 Pac. 248], where it is said:

“The finding of the court that “the office became vacant and the plaintiff ceased to be such constable on the fifteenth day of October, 1900,” is based upon the provision of section 996 (7) of the Political Code, that an office becomes vacant by the “ceasing of the incumbent to discharge the duties of his office for the period of three consecutive months except when prevented by sickness, or when absent from the state by permission of the legislature;” and it is urged that inasmuch as the appellant was continuously held in confinement at San Jose for a period of more than three consecutive months from the date of his arrest, he of necessity ceased to discharge the duties of his office during that period, and therefore at the expiration of three months from his arrest, his office *ipso facto* became vacant. We are of the opinion, however, that this is not a proper construction to be given to this provision of the section, but that, in order to create a vacancy in the office, the cessation to discharge its duties for the designated period must be the voluntary act of the incumbent. The section provides for many of the contingencies upon which a vacancy will be created, and it will be noted that with the exception of the death of the incumbent each of these contingencies contemplates some proceeding against him, in which he will have an opportunity to controvert the ground on which the vacancy is claimed, or some act initiated by himself and voluntarily carried into effect. It is in harmony with the other provisions of the section that, in order to create a vacancy in the office, the cessation to discharge its duties for the period of three consecutive months must have been voluntary on his part, and we hold that such construction must be given to the provision.” See, also, *Ward v. Marshall*, 96 Cal. 155, [31 Am. St. Rep. 198, 30 Pac. 1113], where the court said:

“The fact that during the time of his suspension from office its duties were performed by a person properly appointed for that purpose, and that the county has paid him the salary, does not affect the right of plaintiff to recover. He was, without fault on his part and against his consent, released from the performance of the duties of such office for the period named. (*Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536, [55 Am. Rep. 835, 7 N. E. 787]; *Andrews v. Portland*, 79 Me. 485, [10 Am. St. Rep. 280, [10 Atl. 458]], see, also, *Johnson v. Brooks*, 139 Ga. 787, [78 S. E. 37], where the court said:

“ ‘Section 264 of the Civil Code provides “that all offices in this state are vacated by abandoning the office and ceasing to perform the duties or either.”—This language of the code means the willful or voluntary forsaking or relinquishment of the office, and not a failure to discharge its duties by reason of the acquiescence in the validity of a statute until it is judicially determined to be nugatory.’

“Counsel for defendant lays particular stress upon the fact that the sealer voluntarily surrendered the paraphernalia of his office. I am of the opinion that no particular importance is to be attached to this act. The sealer was restrained from making use of the paraphernalia, and the city had notified him that it would no longer pay rental for his office, and it is not at all unreasonable that he presumed that when the paraphernalia could be used, he could have obtained it.

“Counsel for defendant also quotes in his brief portions of a letter from the sealer to the mayor relative to the bureau of weights and measures, referring to its ‘re-establishment.’ I fail to see that this particular correspondence or any of the correspondence which is in evidence shows any intention to abandon the office or any ceasing to perform its duties other than had already taken place by reason of the injunction. The sealer uses the word ‘re-establishment’ in his letter and counsel for defendant has argued from this that he considered the office abandoned. I cannot agree with him, other portions of the letter show that such was not his intention, and furthermore, the word re-establishment may have been used advisedly, for certainly the office was in need of re-establishment as soon as the injunction which had practically abolished it, would be dissolved.

“Counsel for defendant also argues that the failure of the sealer and his deputies to take up the duties of his office as soon as the decision in *Scott v. Boyle* was announced shows that he considered his office vacant. I am of the opinion that the argument is not sound. The judgment of the supreme court in the Scott case did not become final until thirty days after its rendition (Dec. 12, 1912), furthermore, the injunction against the sealer was still in force, and still further, a failure to perform the duties of the office from Dec. 12 to Dec. 31st (the date of the resignation of the sealer) would not constitute a vacancy in the office, for the ceasing to perform the duties of the office must continue for three consecu-

tive months. Counsel for defendant cites in support of his contention that a vacancy occurred in the office, *People ex rel. McGarvey v. Hartwell*, 67 Cal. 11, [6 Pac. 873]. I am of the opinion that the case is not in point with the one at bar. In the case cited, the claimant could at any time during the two years, have demanded his office or at least made an attempt to perform its duties. In the case at bar the sealer and his deputies were restrained from performing their duties. In that case the court said: 'Public office is held upon the implied condition of diligently and faithfully executing the duties belonging to it and a *willful* refusal to perform the duties works a forfeiture.' In the case at bar, it cannot be said that the refusal to perform the duties was willful, for the injunction prevented their performance. In view of the injunction and in view of the fact that the sealer and his deputies at least made an effort to perform the duties of their respective offices, I am of the opinion that no vacancy occurred in the office and that they held office until the date of their resignation.

"The only other point to consider is, are there funds in the treasury of the city and county applicable to the warrants which petitioner demands?

"The referee is of the opinion that for the purpose of this inquiry it is immaterial whether there are or not. The proceeding now before the court is a proceeding to compel the auditor to issue his warrant, and the only question pertinent to this inquiry is, is the petitioner entitled to the warrant; if he is, it should be issued. See *Ott Hardware Co. v. Davis*, 165 Cal. 795, 799, 800, [134 Pac. 973].

"But should the question as to whether there is a specific fund upon which these warrants can be drawn be a material one, I would have to determine that the fund exists. Some eight thousand dollars was appropriated to pay the salaries and expenses of the sealer and his deputies. The evidence shows that this fund was not drawn upon, but that it was merged in the fund known as the general fund at the end of the fiscal year 1912. If the general fund has been enriched by this specific fund, it is to be presumed that this fund still exists and is applicable to the payment of the warrants in question.

"To conclude, the referee is of the opinion that his award should be in favor of the petitioner in both the questions of

fact which were submitted to him, and findings and conclusions may be prepared accordingly."

It is therefore ordered that the peremptory writ of *mandamus* issue from this court to the defendant, as auditor of the city and county of San Francisco, commanding him to deliver to the petitioner warrants for the salary of himself and his assignors due on May 1, 1912, and on the first of each and every month thereafter to and including January 1, 1913, aggregating the sum of \$6212.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1262. Third Appellate District.—September 21, 1914.]

MATTIE E. DAVIDSON, Petitioner, v. EUGENE D. GRAHAM, Respondent.

JUDGMENT—MANDAMUS TO COMPEL ENTRY OF DEFAULT—DEMURRER TO PETITION—ADMISSION.—On demurrer to a petition for *mandamus* to compel a clerk of the superior court to enter the default of the defendant the allegations of the petition must be taken as true.

ID.—DEFAULT OF DEFENDANT—SAVING BY FILING OF DEMURRER.—A demurrer filed by the defendant in an action on a bond is an appearance and an "answer" within the meaning of the provision of section 585 of the Code of Civil Procedure, that "if no answer has been filed with the clerk of the court, within the time specified in the summons or such other time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant."

ID.—DEMURRER—NECESSITY OF DISPOSING OF BEFORE ENTRY OF JUDGMENT.—It is irregular to enter a judgment against a defendant in whose behalf a demurrer has been filed, without disposing of the demurrer, and a judgment so entered will be reversed on appeal.

ID.—ENTRY OF DEFAULT—MANDAMUS TO COMPEL—WHEN DOES NOT LIE.—Where a stipulation is on file "that no default shall be taken against the defendant, he waiving his demurrer," and there is a doubt as to the right of the plaintiff to take a default and as to the duty of the clerk to enter it, the entry will not be compelled by *mandamus*.

ID.—CLERK WILL NOT BE COMPELLED TO PERFORM ACTS IN CONFLICT WITH COURT ORDERS.—If the plaintiff has been refused an order by the trial court putting the defendant in default, an appellate

court will hesitate to command the clerk to enter a default. The rule that a court will not compel parties to perform acts which will subject them to punishment or put them in conflict with the order or writ of another court, applies where a clerk is asked to perform an act that will put them in conflict with a valid order made by the same court in the same action and upon the same matter.

Id.—TRIAL ON MERITS—POLICY OF LAW TO PERMIT.—It is the policy of the law that every case should be tried upon its merits, and where it is sought to prevent this upon a showing which presents no circumstances of hardship to the party asking the relief, and the case is one where the right to the relief is doubtful, the parties should be remitted to a trial upon the merits.

APPLICATION for a Writ of Mandate to be directed to the Clerk of the Superior Court of San Joaquin County.

The facts are stated in the opinion of the court.

Webster, Webster & Blewett, for Petitioner.

A. H. Carpenter, and Walter F. Lynch, for Respondent.

CHIPMAN, P. J.—This is an application for a writ of mandate commanding defendant to enter the default of A. T. Karry in a certain action wherein Mattie E. Davidson is plaintiff and Samuel Hinckley and A. T. Karry are defendants, now pending in the superior court of San Joaquin County.

It appears from the amended petition that the action above referred to was commenced to recover judgment upon a bond, in which Hinckley and Karry were sureties, to stay execution in a certain action entitled Emanuel Gjurich, Plaintiff, v. Fanny Fieg, Defendant, pending in the superior court of San Joaquin County. Petitioner is assignee of the assignee of plaintiff in said action last referred to. Summons in the present action was duly served on Karry, February 13, 1913, and, on July 28, 1913, he filed therein a general demurrer and a demurrer also to the jurisdiction of the court. It further appears from the petition that, on August 18, 1913, "there was entered into and filed in said action a stipulation in the words and figures as follows, to wit: (Title of court and cause.) 'It is hereby stipulated and agreed that no default shall be taken against the defendant, A. T. Karry, he waiving his demurrer, and that the said defendant, A. T.

Karry, shall have to and inclusive of September 15, 1913, in which to file and serve his answer on the merits. Dated this 18th day of August, 1913.

“ ‘WEBSTER, WEBSTER & BLEWETT,

“ ‘Attorneys for Plaintiff.

“ ‘I agree to the above stipulation:

“ ‘A. H. CARPENTER,

“ ‘Attorney for Defendant, A. T. Karry.

“ ‘By Walter F. Lynch, Clerk.’ ”

The demurrer above referred to was similarly signed. It is alleged that Mr. Lynch was authorized by Mr. Carpenter to sign both the demurrer and stipulation in his name and that both were signed with the knowledge and consent of Karry. We understand that no question is now raised as to Lynch's authority to act in the matter.

It is alleged in the petition that “it was distinctly agreed and understood that by reason of the plaintiff's giving and granting to said defendant, A. T. Karry, to and inclusive of September 15, 1913, in which to file and serve his answer on the merits, the said demurrer should be and was waived and withdrawn and that no default should be taken against the defendant Karry if his answer on the merits should be filed on or before said September 15, 1913, but if said answer should not be filed on or before September 15, 1913, then such default might be taken.” It is then alleged that several oral stipulations were entered into extending the time in which Karry might answer, “but no oral stipulation extended the time to later than the 30th day of November, 1913”; that, on December 1, 1913, plaintiff filed with the clerk of the court a demand as follows: “In this action the defendant, A. T. Karry, having been regularly served with process, and having failed to appear and demur or answer the plaintiff's complaint within the time prescribed by law, and stipulation, and the legal time for demurring or answering having expired, application is hereby made by the plaintiff to the clerk of said court for the entry of a default against said defendant, A. T. Karry. Dated December 4, 1913. Webster, Webster & Blewett, Attorneys for Plaintiff.”

It is alleged that all legal fees were at the same time tendered said clerk but that he “refused to enter said default.” It further appears that, on December 16, 1913, plaintiff served upon defendant's attorney, Carpenter, and filed a notice that

he would, on December 23, 1913, move the court "for its order that plaintiff take a judgment against the defendant A. T. Karry on the grounds that said defendant A. T. Karry has not answered to the complaint of plaintiff herein within the time allowed by law. Said motion is based and will be heard upon the records in this action including this notice of motion."

Thereafter and on the same day, to wit, December 16, 1913, defendant Karry, by his attorney, A. H. Carpenter, served and filed a general demurrer to the complaint in the action, and, on January 19, 1914, the said motion having come on to be heard, the court made an order "denying plaintiff's motion for judgment herein without prejudice, to which ruling counsel for plaintiff duly excepts."

Petitioner claims that when the demand was made upon the clerk to enter Karry's default it became the duty of the clerk, in the exercise of a mere ministerial act, to comply with the request; citing section 585 of the Code of Civil Procedure: "Judgment may be had, if the defendant fails to answer the complaint, as follows: 1. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court, within the time specified in the summons or such other time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant."

When the matter was here on the original petition it did not appear that said stipulation was executed by defendant Karry, nor that it was executed by Karry's attorney, but by the attorney's clerk whose authority to sign the name of the attorney was not shown. Nor did it appear that there was any oral agreement or understanding not expressed in the stipulation. The amended petition, however, alleges that the stipulation was executed with the consent of Karry, and that Mr. Lynch was authorized to execute it for Attorney Carpenter, and on demurrer to the petition we must assume this to be the fact.

The demurrer filed by Karry's attorney was an appearance and was an answer within the meaning of the provision of the code above quoted. (Code Civ. Proc., sec. 1014.) It is irregular to enter a judgment against a defendant in whose behalf a demurrer has been filed, without disposing of the

demurrer, and a judgment so entered will be reversed on appeal. (*Hestres v. Clements*, 21 Cal. 425.)

It is contended, however, that the effect of the stipulation waiving the demurrer was to withdraw it from the case, leaving defendant Karry with no other right than to answer within the time given him by the stipulation. In the opinion written by Mr. Justice Burnett, some doubt was expressed as to whether a demurrer could be waived, as it presents an issue of law which must be tried by the court (Code Civ. Proc., sec. 591); and there being no statutory provision for waiving a demurrer, to effectually dispose of it some order of the court might probably be required. But it was also said that, conceding the effect of the stipulation to be as claimed "it would at least appear doubtful whether according to its terms, the clerk should enter the default of defendant Karry. Therein it is provided that 'no default shall be taken against the defendant A. T. Karry.' As to this covenant, there is certainly no express limit as to time. Probably the parties signing the paper intended to provide that no default would be taken prior to September 15, 1913, but if so it should have been more clearly expressed, and it is not an unreasonable construction that, in view of the waiver of the demurrer, no default was to be taken, although there was no express agreement to extend the time to answer beyond September 15, 1913."

We venture to suggest further that it is very doubtful whether the waiver of the demurrer was intended to effect a withdrawal of defendant's appearance or whether it was anything more than an agreement not to urge it. It is quite certain that plaintiff treated defendant as having appeared by stipulating with him and filing the stipulation. And he says in his petition that he granted several other extensions of time, orally, in which to answer. However this may be, when the demand was made upon the clerk he had before him as authority for entering defendant's default nothing but this stipulation, indefinite as to its meaning and accompanied by no evidence that it was signed either by the authority of the defendant or his attorney. It is true that the amended petition shows that such authority existed and that it was agreed that unless an answer was filed by September 15, 1913, a default might be taken, but there is no averment or evidence that the clerk knew such to be the fact. He had a right to

act and the correctness of his act must be judged upon what was before him as a basis for the demand. "The right which it is sought to protect must be clearly established, and the writ is never granted in doubtful cases. The person seeking the relief must show a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced." (High's Extraordinary Legal Remedies, sec. 9.) We have seen that there was here both a doubt as to the right of the petitioner to the relief sought and the duty of the respondent to grant it.

Furthermore, inasmuch as petitioner sought an order of the trial court for the same relief in the same action and on the same facts as were before the clerk, and was refused, we should hesitate to command the clerk to do the thing which on petitioner's application the court had in effect ordered should not be done. It has been held that a court will not compel parties to perform acts which would subject them to punishment, or which would put them in conflict with the order or writ of another court. (Id., sec. 23.) The same rule should apply where a clerk is asked to perform an act when it would put him in conflict with a valid order made by the same court in the same action and upon the same matter.

It is the policy of the law that every case should be tried upon its merits, and where it is sought to prevent this upon a showing which presents no circumstances of hardship to the party asking the relief and the case is one where the right to the relief is so doubtful as it is in this case, we think the parties should be remitted to a trial upon the merits.

The peremptory writ is denied.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 20, 1914.

[Civ. No. 1242. Third Appellate District.—September 21, 1914.]

WILLIAM H. REYNOLDS, Appellant, v. GEORGE H. JACKSON, Respondent.

PARTNERSHIP—PURCHASE AND SALE OF LANDS—ACTION FOR ACCOUNTING.

In this action for an accounting of the dealings and transactions of an alleged partnership for the purpose of procuring options on, buying, selling, and dealing in a certain tract of land, the evidence introduced by the defendant justifies the finding that the plaintiff's assignor and the defendant did not enter into the contract of partnership described in the complaint, but that they did make an agreement concerning the sale of the land at the time a partnership is alleged to have been formed by them, which agreement the plaintiff failed to carry out, and that he was therefore not entitled to share with the defendant in the profits on the sale made by the latter.

ID.—AGREEMENT TO DIVIDE COMMISSIONS—EVIDENCE TO SUPPORT FINDING.—There is also evidence to support that part of a finding which declares that the defendant agreed that, if the assignor of the plaintiff found a purchaser of the land referred to in the complaint, the defendant would divide the net commissions received by him.

ID.—AGREEMENT TO ACCOUNT FOR PROFITS—IMMATERIAL ISSUE—ABSENCE OF FINDING.—In such action the omission to make a specific finding upon the alleged fact that the defendant agreed to account to the plaintiff's assignor for the profits realized from the sale of the land and to pay him one-half thereof, is immaterial, in view of the finding that the assignor neither sold nor procured a purchaser for the land or any part of it.

ID.—INCONSISTENCIES IN TESTIMONY—PROVINCE OF TRIAL AND APPELLATE COURTS.—Discrepancies or inconsistencies in the defendant's testimony in such action are for the trial court to consider in connection with its consideration of his entire testimony and his demeanor while testifying; and if it appears that the trial court believed and credited his testimony in the main, it is not for an appellate court to say that the discrepancies in his testimony, if in reality any there were, should be held to be of sufficient force or significance by way of impeachment to have required the court which heard and saw him testify to repudiate or disregard his testimony *in toto*.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Fitzgerald, Abbott & Beardsley, for Appellant.

W. J. Herrin, and A. H. Hewitt, for Respondent.

HART, J.—The plaintiff, as the assignee of W. B. Reynolds, brought this action for an accounting “of all the dealings and transactions of” an alleged copartnership, “and for such other and further relief as may be just,” etc.

The complaint alleges that, “on or about the fifteenth day of July, 1904, W. B. Reynolds and defendant, at the city and county of San Francisco, state of California, entered into and formed a copartnership, as equal partners, for the sole purpose of procuring options on, buying, selling and dealing in, a certain tract of land, situated in the county of Sutter, in said state; and that said W. B. Reynolds and defendant thereupon entered upon and transacted said copartnership business. That said tract of land was on or about the 1st day of October, 1904, finally sold and disposed of, resulting in a profit to said partnership, as plaintiff is informed and believes, in at least the sum of \$25,000.00.”

It is further alleged that the defendant, at the time of the establishment of said copartnership, promised and agreed with said W. B. Reynolds to account to and pay over to him (Reynolds) his proportional share of all moneys received on account of said partnership and its dealings in said tract of land. It is then complained that the defendant has collected and received the whole of the profits accruing to the said copartnership by reason of the sale of said tract of land, that the profits so received amount to at least the sum of twenty-five thousand dollars, and that the defendant has wrongfully and without the assent of the plaintiff appropriated the same to his own use and benefit; that neither the plaintiff nor said W. B. Reynolds has ever received or been paid any money by the defendant on account of said profits; that no settlement of said copartnership accounts has ever been made or had between the said W. B. Reynolds and the defendant or between the plaintiff and the defendant; that the plaintiff and said W. B. Reynolds have each frequently applied to and demanded of the defendant to come to a final settlement with respect to said copartnership accounts, but that the defendant has always refused and still continues to refuse to render either to the plaintiff or to the said W. B. Reynolds any account whatsoever

of the said copartnership affairs or of the copartnership money received by him; that it will appear upon a just and true settlement of the said copartnership account that a large sum of money will be due from said defendant in respect of said copartnership.

It is averred that, on the first day of December, 1904, said W. B. Reynolds sold and transferred all his interest in said copartnership, its property, money, and demands, to the plaintiff.

The answer specifically denies each and all the material averments of the complaint.

The court found that said W. B. Reynolds and the defendant did not at any time enter into or form a copartnership as equal partners or otherwise for the purposes mentioned in the complaint. The court did find, however, that the plaintiff's assignor and the defendant, on the fifteenth day of July, 1904, or thereabouts, entered into an oral agreement by the terms of which the defendant agreed that if the plaintiff's assignor would sell or find a purchaser for the tract of land referred to in the complaint, the defendant would divide with said W. B. Reynolds the net commissions to be received by him from the sale of said tract of land. But the court further found that "plaintiff's assignor did not sell said land, or any part thereof, nor did he find a purchaser for said land, or for any part thereof."

As a conclusion of law from the facts as found, the court found that the plaintiff is not entitled to anything by reason of this action, and judgment passed to the defendant accordingly.

The plaintiff appeals from said judgment and from the order denying him a new trial.

The points urged for a reversal are mainly that the findings are not supported and that the court failed to find on a material issue.

It is unnecessary to give here a detailed or even an extended epitomized statement of the testimony of the plaintiff's assignor, W. B. Reynolds, and that of other witnesses called by him. Respecting the evidence offered and received in support of the complaint, it will be sufficient to say that said Reynolds testified to the formation, in July, 1904, by oral agreement, of a copartnership between himself and the defendant, as alleged in the complaint, and that other witnesses

testified to facts and to declarations by the defendant tending strongly to corroborate the testimony of the plaintiff's assignor upon that point; that said Reynolds testified further that, upon the establishment of said copartnership, he at once proceeded to take steps to find a purchaser of the land to which the partnership agreement related, and that finally he met and talked with one E. Wineman, of San Luis Obispo (who was looking for an investment in land), relative to the land for the sale of which said alleged copartnership was formed, and that Wineman eventually and within a short time after said conversation purchased said land; that the defendant afterwards admitted to said Reynolds that he made a profit of nine thousand dollars on the transaction, but denied that Reynolds was entitled to any part thereof.

The defendant testified, however, that he never at any time had any transaction involving the subject matter of this action with W. B. Reynolds. "He (referring to said Reynolds) asked me if I had some land suitable for dredging and reclaiming," testified the defendant. "This was long before the sale was made. I had no transactions with Mr. Reynolds regarding the sale of land in Sutter County. I didn't have any transactions with the man at all. I had a conversation with him. I don't remember now just what time. He came to me on the street in front of the Lick House, some time along in the summer. That conversation did not relate to the land that Mr. Wineman purchased, only a small portion of it—to the portion of land that belonged to Antone Borel and Mr. Nutal. There were four thousand seven hundred acres in that tract. It was situated in Sutter County about three or four miles out from Marcuse. That is part of the land that I sold to Mr. and Mrs. Wineman and referred to in the depositions of Mr. and Mrs. Wineman just read. Regarding this land, Mr. Reynolds told me that he had a man who had two dredgers, and he was looking for a piece of land to buy, and he wanted the land where he could reclaim it, and wanted to know if I had land suitable for that business, and I mentioned this particular piece of land and told him that it might make a fairly good reclamation—this portion. I made an agreement with him regarding the sale of the land. The agreement was not in writing. After talking to me about the land, he spoke about this man and he said—he wanted to know the price and I told him that if this man would sell this

land for ten dollars, we would divide two dollars and a half an acre on the land. He would take \$1.25 and I would take \$1.25 if it was sold at ten dollars. That is all the agreement I had with him. I never had any other agreement with him concerning any other land in Sutter County. That is the only piece of land that I had an agreement with him concerning the sale of. He never sold the land. He never came to me with the name of a purchaser. He told me several times on the street that somebody was going to come. I had not had the land for sale so very long; a few months. I had the land staked out—knew that I could get it any time I wanted it, but I told Mr. Borel that whenever I found a purchaser, I would call on him for an option for this land; but I never got the option until away along in the latter part—I don't know—but it was the first of August, somewhere along there. The option was in writing. Mr. Borel signed it, but I did my business with his private secretary." The defendant further testified that he thought that he introduced W. B. Reynolds to Wineman, the purchaser of the Sutter County lands. After Wineman had decided to buy the land through the defendant, the latter met Reynolds at the Lick House. Reynolds asked the defendant if he had sold Wineman "a lot of land" in Sutter County, and, upon an affirmative reply by the defendant, insisted that he (said Reynolds) having first brought Wineman's attention to said land and thus put him in the way of making the purchase, was entitled to his share of the profits from the sale. The defendant replied to Reynolds: "I am not going to give you a red cent—not a cent." The defendant contradicted the testimony of certain witnesses called for the plaintiff to the effect that the defendant had said to them, prior to the sale of the land to Wineman, that W. B. Reynolds was an equal partner with him in the option on and sale of said land and the profits accruing from said sale. The defendant further testified that he was under an agreement with Umbesen & Co., with whom he was connected insofar as the handling of country real estate was concerned, whereby he was to pay said firm one-third of the profits on all sales of such lands made by him.

Wineman testified that his attention was first called to the land purchased by him by an advertisement that he observed in one of the San Francisco daily newspapers; that he and his wife thereafter went to San Francisco and called at the office

of Umbesen & Co., where the advertisement directed them to go to inquire about the land; that there they met the defendant, who, the following morning, started with Wineman and wife to Sutter County to inspect the land; that, after viewing it, he concluded to buy the property, and, returning to San Francisco, there closed the deal. He said that he had no recollection of ever meeting with Reynolds until after the sale of the land to him had been completed, and this meeting took place at the Lick House, in San Francisco. Subsequently he again met Reynolds, who said to him that he (Wineman), in buying the land from the defendant, had "bought no land—you bought an ocean," and that Reynolds further said to him "if we could back out on that bargain we made with Mr. Jackson, he could save us ten thousand dollars, sell us the land cheaper, ten thousand dollars cheaper. . . . Mr. Reynolds did not at any time ever mention this land to me before I went up to Sutter County to see it with Jackson."

Thus there has been given a sufficient statement of the evidence introduced by the defendant to show that there was, so far as this court can determine, sufficient justification for the finding that the plaintiff's assignor and the defendant did not enter into the contract of copartnership described in the complaint, but that they did make an agreement concerning the sale of said land at the time the alleged copartnership is alleged to have been formed and entered into by and between them, but that the plaintiff failed to carry out his part of said agreement and was, therefore, not entitled to share with the defendant in the profits on the sale made by the latter.

It may be true, as counsel for the plaintiff undertake to point out, that the defendant's testimony is characterized by certain discrepancies or inconsistencies, but these were matters for the trial court to consider in connection with its consideration of the defendant's entire testimony and his demeanor while testifying. If, as appears to be true, the trial court believed and credited his testimony in the main, then it is not for this court to say that the discrepancies in his testimony, if in reality any there were, should be held to be of sufficient force or significance by way of impeachment to have required the court which heard and saw him testify to repudiate or disregard his testimony *in toto*. The proposition that an appellate court will not disturb findings based upon evidence wherein there is a substantial conflict has been so often stated

and applied that its reputation would seem to be supererogatory. In this case, there being nothing inherently improbable in the testimony of the defendant, notwithstanding the asserted inconsistencies or contradictions pointed out therein, such a conflict does exist, and when we are asked to set aside findings which have been predicated upon testimony which may involve certain inconsistencies or contradictions, which in themselves do not necessarily render such testimony so intrinsically improbable as to justify us in declaring that it is, upon its face, wholly unbelievable, we are called upon to perform a duty which, in the very nature of things, a reviewing court cannot well be expected satisfactorily to discharge, viz: weighing and so determining the credit to be accorded testimony given *viva voce* before another tribunal. Even if it be true that the defendant became tangled or confused to some extent in his attempted explanations of the price he was to pay for certain lands, of the lands included in those constituting the tract sold to Wineman, and of the amount he was to pay Reynolds in case the latter himself sold or found a purchaser of the Borel tract, the fact remains that he unequivocally declared that there was no arrangement entered into between him and Reynolds except the one found by the court to have been made, and it was within the legal province of the court to believe that statement as against the confusion into which he may seem to have been led as to the details referred to as well as against the counter-statements of W. B. Reynolds and other witnesses for the plaintiff.

It is next contended that there is no evidence to support that part of finding 2 which declares that the defendant agreed that, if the assignor of plaintiff found a purchaser of the land referred to in the complaint, he (defendant) would divide the "net commissions received by him." We think there is enough evidence in the record to have authorized the court to make that part of the finding. The defendant testified (p. 120, trans.) that he was told by Borel's secretary that the Borel tract could be bought for six dollars per acre, and that he then figured on selling it at ten dollars per acre; that he proposed to Reynolds that if he secured a purchaser for the land at the last mentioned figure, they would thereby make a profit of \$2.50 per acre, or \$1.25 each per acre. He said that, while he would at the figures men-

tioned receive for the land four dollars per acre in excess of the sum paid for it, he would, however, be required to pay one-third of said excess to Umbesen & Co., and, besides, pay other necessary expenses incurred in negotiating the sale, such as the expense of an abstract and that of taking the parties to the land, etc. He testified (p. 134, trans.) that he figured that the sum he would be required to pay Umbesen & Co., and the expenses attending the consummation of the transaction would total about \$7.50, and thus there would be left, to be divided between himself and Reynolds, in case the latter sold or procured a purchaser for the tract, the sum of \$2.50. There can hardly be any reason to say that the court was not justified in finding from this testimony that the agreement of the defendant was that he "would divide with plaintiff's assignor the net commissions (or profits) to be received by him from the sale," in the event that Reynolds procured a purchaser. Counsel, however, attempt to establish a distinction between the term "commissions" and the term "profits," and declare that the finding is not sustained because the testimony shows that the division between Reynolds and the defendant was to be of the "profits" and not of "net commissions," as the finding states. But, while the two terms are not, in a commercial sense, strictly convertible, the one being more applicable to sales of merchandise and the other to sales of real estate, still in effect they mean one and the same thing in this case. What is unquestionably meant by both the finding and the testimony is that what remained out of the money received on the sale, over and above the cost of the land, and after expenses in negotiating it were deducted, should be equally divided between the parties, if Reynolds was the procuring cause of the sale.

The last point made by the plaintiff is that the court failed to find on a material issue raised by the pleadings. This point arises from the omission by the court to make a specific finding upon the alleged fact that the defendant agreed to account to Reynolds for the profits realized from the sale of the land and to pay him one-half thereof.

But the obvious reply to that proposition is to be found in findings Nos. 2 and 3, the first of which necessarily implies that the defendant agreed to render to W. B. Reynolds an account of the profits on the sale of the land and to pay him his proportionate share thereof, while finding 3 rendered a

finding on said issue wholly unnecessary. To be more explicit: While the court found that the copartnership as alleged in the complaint was not formed by and between the parties, it did find (finding 2) that, on the day upon which the alleged copartnership was established, the parties did enter into a convention of the nature of a broker's rather than of a partnership agreement, by the terms of which they were to share equally in the profits realized from the sale of the land referred to in the complaint, provided the plaintiff's assignor either sold or procured a purchaser of said land. Of course, the latter finding, as stated, of necessity implies a finding that the defendant agreed to account to W. B. Reynolds for the profits from the sale and to pay him his share thereof according to the terms of the agreement, if said Reynolds carried out his part of said agreement. In other words, such an agreement necessarily carried with it an agreement on the part of the defendant, without an express stipulation to that effect, to account to Reynolds for and pay to him his share of the profits, if he (Reynolds) executed his part of the contract, and therefore, a finding that such an agreement was made necessarily carries with it a finding that the agreement by the defendant to account to Reynolds for the profits, etc., was made. But the court further found (finding 3) that Reynolds neither sold nor procured a purchaser of said land or of any part thereof, hence, since, under that finding, no duty rested on the defendant to account to Reynolds for the profits, etc., it became entirely unnecessary for the court to make a specific finding upon that issue, for, in view of the finding last referred to, a finding upon said issue would merely have amounted to a declaration that the defendant agreed to account to Reynolds for profits arising from a transaction in which he had no interest.

We perceive no importance, in its bearing upon the point last considered, in the discussion in the briefs of the question whether, as the plaintiff contends, a finding by the court, upon sufficient evidence, that an agreement other than a partnership agreement had been entered into between the parties whereby they were to receive an equal share of the profits obtained from the sale of the land referred to in the complaint, would come within the fair and reasonable import or intendments of the averments of a partnership agreement contained in the complaint and the issues made. (See

Gorham v. Heiman, 90 Cal. 346, 358, [27 Pac. 289]; *McArthur v. Blaisdell*, 159 Cal. 604, [115 Pac. 52]; *Bedolla v. Williams*, 15 Cal. App. 738, [115 Pac. 747].) But, conceding the proposition to be important here, the reply to it is that, as shown, the court did find that an agreement of a different character from the one pleaded was entered into between the parties for the purpose of selling the land mentioned in the complaint and of dividing equally between them the profits arising from the sale of said land.

We think the record is free from error and, therefore, the judgment and the order denying the plaintiff a new trial should be affirmed. It is so ordered.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1810. First Appellate District.—September 22, 1914.]

ANNIE CAIN, Respondent, v. HENRY FRENCH,
Appellant.

PROMISSORY NOTE—UNDUE INFLUENCE AND WANT OF CONSIDERATION—

ACTION FOR CANCELLATION—SUFFICIENCY OF EVIDENCE.—In this action for the cancellation of a promissory note which the plaintiff contends was executed without consideration and as the result of undue influence, and which the defendant contends was accepted by him as a compromise of his claim against the plaintiff for legal services rendered by him for her, the evidence is sufficient to support the general verdict in favor of the plaintiff on the issue of want of consideration, and any inquiry into the sufficiency of the evidence on the issue of undue influence therefore becomes unnecessary.

ID.—REHEARING OR TRANSFER OF CASE—POINTS THEN RAISED FOR FIRST TIME.—Points raised for the first time in a petition for rehearing or for a transfer to the supreme court will not be considered by the court of appeals.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order refusing a new trial. P. F. Gosbey, Judge.

The facts are stated in the opinion of the court.

Henry French, *in pro. per.*, for Appellant.

W. A. Beasley, for Respondent.

KERRIGAN, J.—The appeal in this case was taken to this court, and an opinion rendered and filed; but it appearing upon a petition for transfer to the supreme court that the action was one in equity, of which the appellate jurisdiction is in the supreme court, the petition for transfer was granted upon that ground. The case was subsequently by the supreme court transferred to this court for decision.

After a careful re-examination of the record and briefs, we are satisfied with the views expressed in our opinion heretofore filed, to which we adhere. That opinion is as follows:

“This is an action brought by the plaintiff against the defendant for the cancellation of a promissory note dated October 19, 1909, for \$400. In addition to his answer denying the averments of the complaint defendant filed a cross-complaint, in which he prayed for judgment against the plaintiff for the amount of the note and costs. An answer to the cross-complaint was served and filed.

“The pleadings presented two issues, to wit, Was there a consideration for the note? (2) Was Annie Cain’s signature to the note procured by undue influence?

“The case was tried before a jury, which returned a special and also a general verdict, finding both issues in favor of the plaintiff. Findings of facts and conclusions of law were filed; a motion for a new trial was denied, and the case is here on an appeal from the judgment and order denying said motion.

“According to the story told by the defendant the plaintiff called on him at his law office in June, 1907, and stated to him that her uncle, a man of advanced age, with whom she had lived for 21 years, working hard for him during that time, had entirely changed his attitude toward her, and that she feared, from things he had said, that he would revoke a testamentary disposition theretofore made in her favor; that she instructed the defendant to interview her uncle, and if possible to persuade him to modify his attitude toward her, and either pay her for the services rendered him, or, in order that she might not be subject to his whims, to induce him to secure to her some of his property in recognition of her 21 years of service. That accordingly defendant interviewed plaintiff’s uncle, and persuaded him to make her an absolute deed of 75 acres of land in the Santa Clara Valley, worth over \$200 per acre. The evidence introduced by the defend-

ant showed also that he rendered her other services, all which defendant claimed were worth more than the amount of the promissory note given to him by plaintiff, and that the note was accepted by him as a compromise of his original claim for fees.

"The evidence introduced by the defendant in support of his answer to the complaint tended to show that he sent his agent to the plaintiff a few days before the time when his claim for services rendered her would be barred by the statute of limitations; that at that time plaintiff stated that she was unable to pay the amount demanded, or any substantial amount, and that it was finally agreed between her and the agent that defendant would accept her promissory note for \$400 in payment for said services; that plaintiff was in good health, and knew exactly what she was doing; that moreover no undue influence was attempted or exercised upon her.

"On the other hand plaintiff testified, on the subject of defendant's services, that she applied to him not as an attorney but as an old friend of her uncle, and so stated to him at the time, and that her request to him was to intercede in her behalf with her uncle for permission to take a vacation, she being ill and needing a rest; that he did render her some service in this regard, and that she paid him for the same. She further testified that the defendant was instructed by her uncle to draw up a deed conveying to her his farm, which deed was to be substituted for some other form of disposition of the property which had theretofore been made to her; that she and her uncle called several times at the offices of the defendant for this deed, but being unable to find him in they finally went to another lawyer and employed him to draw the required instrument, by which there was conveyed to plaintiff by her uncle the land mentioned, which deed was duly executed and recorded; that the defendant was paid for his services concerning the deed, and his receipt therefor taken. In brief, as to this branch of the case, plaintiff's testimony is to the effect that the defendant was paid in full for all services rendered by him to her and her uncle.

"On this subject of the consideration for the note there is sufficient evidence given by the plaintiff to support the general verdict of the jury in her favor. Irrespective, then, of plaintiff's allegations of the employment by the defendant of undue influence in procuring the execution of the note, the

defendant could not recover thereon. It becomes, therefore, unnecessary to go into a discussion of the evidence as to such undue influence upon which the special verdict of the jury was founded."

In the petition for transfer to the supreme court we note that several points are made which were not theretofore raised. These we think are without substantial merit; but in any event points raised for the first time in a petition for rehearing or for transfer will not be considered. (*Payne v. Treadwell*, 16 Cal. 221; *Kellogg v. Cochran*, 87 Cal. 192, [12 L. R. A. 104, 25 Pac. 677]; *San Francisco v. Pacific Bank*, 89 Cal. 23, [26 Pac. 615, 835].)

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 21, 1914.

[Civ. No. 1276. First Appellate District.—September 23, 1914.]

WM. H. HATFIELD, Appellant, v. PEOPLES WATER COMPANY (a Corporation), et al., Respondents.

WATER COMPANY—CHARGING EXCESSIVE RATES—FORFEITURE OF FRANCHISE—ACTION BY INDIVIDUAL TO DECLARE—CONSTITUTIONAL LAW.

The statutory provision (Stats. 1881, p. 54) that "any person, company, association or corporation charging, or attempting to collect from the persons, corporations, or municipalities using water, any sum in excess of the rate fixed as hereinbefore designated, shall, upon the complaint of . . . any water rate payer, and upon conviction before any court of competent jurisdiction . . . forfeit the franchise and waterworks of such person, company, association, or corporation to the city and county, city or town, wherein the said water is furnished and used," is unconstitutional in so far as it purports to confer upon a water rate payer the power to compel a forfeiture of the franchises and works of a water company because of an alleged overcharge.

Id.—STATUTORY PROVISION — CONFLICT BETWEEN AND CONSTITUTIONAL PROVISION RELATIVE TO WATER RATES.—Such statute, so far as its forfeiture clause is concerned, is inconsistent with and in contraven-

tion of that provision of the constitution which regulates the establishment of water rates, and declares that "any person, company, or corporation collecting water rates in any city and county or city or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use."

ID.—FORFEITURE OF FRANCHISE—STATE AND CITY ONLY PARTIES INTERESTED.—Only two parties can be said to be interested in the procurement of the forfeiture provided for in the constitution, namely,—the state in the first instance, and, secondly, the city where an excess rate may have been collected.

ID.—MISCONDUCT OF CORPORATION DOES NOT IPSEO FACTO WORK FORFEITURE OF CHARTER.—Conduct constituting a cause for the forfeiture of corporate charters and franchises will not *ipso facto* operate to produce such a forfeiture; notwithstanding such conduct, the corporation continues to exist until the sovereignty which created it shall procure an adjudication of forfeiture and enforce it.

ID.—REVOCATION OF CHARTER CAN BE ACCOMPLISHED ONLY BY SOVEREIGNTY.—The revocation of corporate charters and franchises is a sovereign right which can be exercised only by the state or in its name.

APPEAL from a judgment of the Superior Court of Alameda County. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

Milton Shepardson, H. A. Luttrell, and R. M. De Soto, for Appellant.

McKee & Tasheira, for Respondents.

LENNON, P. J.—The prayer of the plaintiff's complaint in this action is that the franchises and waterworks of the defendant, Contra Costa Water Company, now claimed to be owned by its codefendant, Peoples Water Company, be declared forfeited to the city of Oakland. The appeal is from a judgment entered upon an order sustaining a demurrer to the plaintiff's third amended complaint without leave to amend. The action is prosecuted by the plaintiff in his capacity as a private citizen; and the gist of his complaint is that he, as a water rate payer in the city of Oakland, was overcharged the sum of \$3.67½ by the defendant, Contra Costa

Water Company, during a specified six months preceding the commencement of the action.

The plaintiff's right as a water rate payer to institute and maintain the action is rested solely upon the provisions of section 7 of the act of March 7, 1881, which read as follows:

"Any person, company, association or corporation charging, or attempting to collect from the persons, corporations, or municipalities using water, any sum in excess of the rate fixed as hereinbefore designated, shall, upon the complaint of . . . any water rate payer, and upon conviction before any court of competent jurisdiction . . . forfeit the franchises and waterworks of such person, company, association, or corporation to the city and county, city or town, wherein the said water is furnished and used." (Stats. 1881, p. 56.)

It is the contention of the defendants that the act last referred to is unconstitutional in so far as it purports to confer upon a water rate payer the power to compel a forfeiture of the franchises and works of a water company because of an alleged overcharge. We are of the opinion that the contention is well taken and must be sustained. The legislative act in question, in so far as its forfeiture clause is concerned, is inconsistent with and in contravention of that provision of the constitution which regulates the establishment of water rates, and declares that "any person, company, or corporation collecting water rates in any city and county or city or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company or corporation to the city and county, or city or town where the same are collected, for the public use."

The constitution, it will be noted, provides that the offending company shall forfeit its franchises and waterworks for public use to the city where the excess rates are collected. Clearly, therefore, only two parties can be said to be interested in the procurement of the forfeiture provided for in the constitution, viz., the state in the first instance, and, secondly, the city where an excess rate may have been collected. Obviously the state is primarily and directly interested because it is the sovereign power from whom the water company derives its charter and franchises (Const. art. XI, sec. 19); and manifestly the city where the excess rate has been collected is also interested because it is by the constitution expressly made the

beneficiary of any forfeiture which may be desired and declared at the behest of the state.

It is the general rule that a corporation is responsible only to the sovereignty by whom it was created; and, ordinarily, conduct constituting a cause for the forfeiture of corporate charters and franchises will not *ipso facto* operate to produce such a forfeiture. Notwithstanding such conduct, "the corporation continues to exist until the sovereignty which created it shall . . . procure an adjudication of forfeiture and enforce it." (*People v. Los Angeles Elec. Ry. Co.*, 91 Cal. 338, 340, [27 Pac. 673].) In other words, the revocation of corporate charters and franchises is a sovereign right which can be exercised only by the state or in its name.

It is clear that supplemental legislation was not required to execute the provision of the constitution providing for a forfeiture of the franchises and works of such water companies as might be guilty of charging or collecting rates in excess of those established by law. The constitutional provision in this behalf is in itself complete and therefore controlling. Moreover, the legislature was neither required nor permitted to enact a law which purported to confer a right in excess of and different from that contemplated by the constitution. It will be seen at a glance that the right to initiate the forfeiture which the legislative enactment in question attempted to confer upon a water rate payer is neither expressly nor impliedly authorized by the provisions of the constitution. And therefore the act to that extent is in conflict with the constitution and to the same extent void.

The judgment appealed from is affirmed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 1373. First Appellate District.—September 25, 1914.]

JULIA J. SILVERIA, as Administratrix of the Estate of
Ellen E. Clark, Deceased, Appellant, v. **PAUL C. ALEX-
ANDER**, Respondent.

DEED—FIDUCIARY RELATIONS OF PARTIES—ACTION TO SET ASIDE.—In this action to set aside a deed, executed by a woman to her physician in consideration of his promise to make certain payments of money and to care for her during the remainder of her life, the findings of the court in favor of the defendant on the issues of lack of mental capacity, want of consideration, and undue influence are supported by the evidence.

ID.—ADEQUACY OF CONSIDERATION—WHETHER MATERIAL.—While the benefits received by the grantor as a result of such contract were small in comparison with the value of the property conveyed, this is not a sufficient ground for setting aside the conveyance. In the absence of fraud, the amount of the consideration for the deed is immaterial.

ID.—SUPPORT OF GRANTOR—WHETHER SUFFICIENT CONSIDERATION FOR DEED.—A deed executed in consideration of the grantee's promise to furnish support to the grantor for life is based upon an adequate consideration.

APPEAL from an order of the Superior Court of Alameda County refusing a new trial. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

Fitzgerald & Abbott, and Charles A. Beardsley, for Appellant.

Jordan, Rowe & Brann, for Respondent.

RICHARDS, J.—This is an action in equity by the plaintiff, as administratrix of the estate of her mother, Ellen E. Clark, in which it is sought to have a certain deed of the premises, described in the complaint, set aside upon the ground that at the time the deed was made, Ellen E. Clark was acting under undue influence and was of such feeble mind as not to know what she was doing, and that no adequate consideration passed to her from the defendant for the property.

Judgment went for the defendant. Thereafter, in due time, plaintiff moved for a new trial, which was denied; and this appeal is from that order.

For some time prior to the date of the deed, the property had stood of record in the name of Peter and Bona Wrancovich, who, in consideration for the deed to them, had agreed with Mrs. Ellen E. Clark, the deceased, to take care of her as long as she lived, if she needed money to get it for her, and to bury her; and they also loaned her two hundred dollars. Thereafter, and while the decedent was at the California Woman's Hospital in San Francisco, feeling that she would be ill for some time and not being on good terms with any of her relatives, she, on the second day of April, 1909, sent for Peter Wrancovich. When he arrived, she told him that there would be a large expense to meet for the hospital and doctor, and, if she died, there would be also her funeral expenses to pay; that she had a splendid doctor, who was going to take care of her as long as she lived, which might be for a year or two. "This expense," she said, "you cannot pay." Finally, she requested him to transfer the property to the defendant. Wrancovich was willing to make the requested deed upon payment to him of the two hundred dollars, which he had advanced. The next morning, April 3rd, 1909, a deed from Wrancovich and wife to Dr. Paul C. Alexander was made and handed to Mrs. Clark; whereupon she sent for the defendant, and when he arrived said to him, "Doctor, here is the deed. You were a good doctor to me. You get the deed, and I get the rent; and you support me as long as I live." To all of which the doctor agreed.

Subsequently, Mrs. Clark was removed from the California Woman's Hospital in San Francisco to the Home of Incurables, also in San Francisco; and on the nineteenth day of April, 1909, sixteen days after the Wrancoviches made the deed to the defendant, she, having been advised that it would be prudent to do so, herself executed a deed of the property to him. At the time of making this last deed, when asked by the attorney who drew it why she was doing so, she replied, "Dr. Alexander has been very kind to me; and he is one of the few friends that I have in the world. He not only has treated me when he thought I didn't have any money, but he has treated me ever since I was in the Woman's Hospital. He is going to take care of me and support me, and give me medical attention as long as I live."

These facts, which are undisputed, were corroborated by the testimony of several disinterested witnesses, as was also

the fact that she was of sound mind at the time the deed was made. Upon the subject of the consideration for the deed, the defendant testified as follows: "There was an agreement or understanding between Mrs. Clark and me other than the money I paid for her in regard to the consideration for the deeds of April 3d and 19th. Mrs. Clark asked me to take care of her as long as she lived; and I certainly did. I gave her medical attendance all the time I agreed to; and I paid for her support and maintenance as I agreed to. I was to defray her funeral expenses, and I did that. I visited Mrs. Clark every day and sometimes twice a day for a period of about six weeks before her death; and I gave her the benefit of my medical skill and advice during that time."

It is admitted by counsel for the plaintiff that the defendant paid out altogether on account of the deceased five hundred and six dollars. In addition to this sum, defendant testified that he visited Mrs. Clark sixty times, and that his visits were worth five dollars apiece, making the further sum of three hundred dollars. Mrs. Clark at the time of her death was fifty-six years old. She was the victim of cancer, and died six weeks after the making of the deed to Dr. Alexander. The deed dated April 19th to the defendant is the one sought by this action to be canceled and annulled.

As before stated, the findings of the trial court were in favor of the defendant; and the plaintiff now, as she did on the motion for a new trial, challenges the sufficiency of the evidence to sustain those findings. She asserts that the defendant used undue influence to procure the deed, that the consideration for the deed was inadequate, and that the decedent was without sufficient understanding to make the transfer in question.

Assuming that the evidence shows that a fiduciary relation existed between the defendant and Ellen E. Clark, sufficient to raise the presumption of fraud, still as the court found on material evidence that no undue influence was exercised on her by the defendant in order to procure the execution of the deed, we are unable, even if so inclined, which we are not, to disturb that finding.

As to the claimed lack of consideration, it is sufficient to say that under the agreement the defendant was to make certain payments of money and to care for Ellen E. Clark during the remaining period of her life. He kept that agree-

ment. True, she died shortly after the deed was executed; but there is nothing in the record to show that her early demise was to be expected. While the benefits received by her as a result of the contract were small in comparison with the value of the property conveyed, this is not a sufficient ground for setting it aside. In the absence of fraud, the amount of the consideration for the deed was immaterial. (*Driscoll v. Driscoll*, 143 Cal. 528, 529, [77 Pac. 471].)

It is not disputed, and it has been repeatedly held that a deed executed in consideration of a grantee's promise to furnish support to the grantor for life is based upon an adequate consideration. (*Norris v. Lilly*, 147 Cal. 754, [109 Am. St. Rep. 188, 82 Pac. 425].)

Coming finally to the question concerning the capacity of Ellen E. Clark to make the deed, and again assuming that the relation between her and the defendant was fiduciary, and that for this reason the law casts upon the defendant the burden of proving that the deed was made by Mrs. Clark while in full possession of her faculties (*Payne v. Payne*, 12 Cal. App. 251, 254, [107 Pac. 148]), still as five witnesses, all unimpeached, testified that she was not of weak or unsound mind, but on the contrary was a woman of exceedingly sound, independent, and strong mind, we are at a loss to see how it can be seriously contended that the finding as to her soundness of mind was not sustained by the evidence.

No other point urged merits consideration.

The order is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1570. Second Appellate District.—September 25, 1914.]

JOSEPH C. MILLIKEN, Appellant, v. JOHN S. MEYERS,
Auditor of the City of Los Angeles, Respondent.

PUBLIC OFFICER—COMPENSATION OF CITY OFFICIAL A MUNICIPAL AFFAIR.

The compensation of a municipal officer is purely a municipal affair, and the charter provisions of the municipality upon that subject are exclusive and conclusive. This is true whether the duties of the office are exacted by the charter or are imposed by the general law of the state.

ID.—CITY DEPUTY SEALER OF WEIGHTS AND MEASURES—COMPENSATION—WHETHER FIXED BY CHARTER OR STATUTE.

A city deputy sealer of weights and measures appointed prior to the adoption of the "Weights and Measures Act" (Stats. 1913, p. 1086), under an ordinance enacted by the city, which has a freeholders' charter empowering it to fix the compensation of all municipal officers, is entitled only to the compensation fixed by the ordinance, not that provided by the statute.

ID.—WEIGHTS AND MEASURES ACT—PURPOSE AND INTERPRETATION.

The Weights and Measures Act seeks to provide a uniform system for the regulation of the measurement and graduation of merchandise, manufactured articles and commodities sold and manufactured throughout the state. It provides for the appointment of a state sealer of weights and measures, makes it compulsory upon the board of supervisors of the various counties to appoint sealers of weights and measures or apply to the state sealer to assign deputies to them, and delegates to the legislative bodies of the various cities of the state the power, the exercise of which is optional, to appoint sealers of weights and measures for such municipalities.

ID.—APPOINTMENT OF SEALERS—DELEGATION OF POWER TO CITIES.

The delegation to a city of such power, to be exercised at its discretion, is the same as though the charter had in express terms made provision therefor, and it becomes a municipal affair to the extent that the making of the appointment and the fixing of the official's compensation is a matter solely within the control and right of the municipality.

APPEAL from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge.

The facts are stated in the opinion of the court.

George E. Cryer, and T. R. Spalding, for Appellant.

Albert Lee Stephens, City Attorney, and Myron Westover, Deputy City Attorney, for Respondent.

SHAW, J.—This was a proceeding for a writ of mandate to compel the defendant, as city auditor of the city of Los Angeles, to audit a warrant in favor of plaintiff upon the treasurer of the city for the sum of \$27.69, alleged to be a balance due plaintiff for services rendered during the month of August, 1913, as city deputy sealer of weights and measures.

Plaintiff appeals from the judgment rendered in favor of defendant.

In order to properly understand the case, reference is had to various acts of the legislature and provisions of the constitution affecting the question. As the constitution stood in relation to the matter prior to October, 1911, it provided that "No state office shall be continued or created in any county, city, town, or other municipality, for the inspection, measurement, or graduation of any merchandise, manufacture, or commodity; but such county, city, town, or municipality may, when authorized by general law, appoint such officers." (Const., art. XI, sec. 14.) Pursuant to this authority, the legislature adopted an act approved March 18, 1911 (Stats. 1911, p. 383), whereby, among other things, it provided that (sec. 4) "The respective counties, incorporated cities, incorporated towns and incorporated cities and counties of the state are hereby authorized to appoint sealers of weights and measures." While this statute was in force the city of Los Angeles, which operates under a freeholders' charter, adopted an ordinance creating the office of sealer of weights and measures and provided for the appointment of deputies, and by ordinance adopted May 28, 1912, fixed the salary of one of such deputies, it being the position held by plaintiff, at the sum of ninety dollars per month in full compensation for all services rendered as such deputy or assistant sealer of weights and measures. Subsequently, on October 10, 1911, section 14 of article XI of the constitution, [Stats. 1911, p. 1798], under and pursuant to which the act of the legislature was adopted authorizing cities to create the office of sealer of weights and measures, was amended so as to read as follows: "The legislature may by general and uniform laws provide for the inspection, measurement and graduation of merchandise, manufactured articles and commodities, and may provide for the appointment of such officers as may be necessary for such inspection, measurement and graduation." Thereupon the

legislature, pursuant to this amended section of the constitution, passed an act, approved June 16, 1913 (Stats. 1913, p. 1086), and designated as the "Weights and Measures Act," providing elaborate regulations for the government of the measurement and graduation of merchandise, commodities, and manufactured articles. This act created the office of state superintendent of weights and measures and authorized him to appoint, upon the request of the counties of the state, deputies for such counties, the salary of each of whom when actually employed being fixed at one hundred and fifty dollars per month, to be paid by such counties. The act also made it the duty of the board of supervisors of each county to appoint a sealer of weights and measures for such county, the compensation of which sealer of weights and measures was fixed at five dollars per day for each day actually employed in the service of the county, and provided that in case such board of supervisors should not, within one hundred and twenty days after the approval of the act, appoint a sealer for such county, it must apply in writing to the state superintendent for the assignment of a deputy superintendent, who, upon such application, was required to make such assignment, and fixed the salary of such deputy so assigned by the superintendent to such county at one hundred and fifty dollars per month; it being further provided that a violation of any of the various provisions of the act should constitute a misdemeanor.

The provisions of the act here involved are contained in section 17 thereof, which provides: "The legislative body of any county, or city and county or of any city or town may appoint a sealer of weights and measures, fix his compensation and provide for the appointment by the sealer of such number of deputies as the said legislative bodies may deem necessary and expedient. Such sealer and deputies shall each receive as compensation the sum of five dollars per day for each day actually employed in the service of such county or city and county or city or town." It is unnecessary to note the inconsistencies of this section with other provisions of the act, so far as it affects and provides for sealers in counties. While the act makes it mandatory upon the board of supervisors either to appoint a sealer or request the state superintendent to assign a deputy for service in such county, section 17, so far as cities are concerned, merely permits them so to

do, it being provided that such city *may appoint* a sealer of weights and measures. It is not required so to do, and in case none be appointed, section 18 of the act provides that the jurisdiction of the county sealer or deputy state sealer assigned to such county shall extend over the entire territorial limits of the county. Section 19 of the act provides that "This act shall not affect the appointment of any sealer of weights and measures heretofore appointed for any city, . . . but such sealers shall perform the duties of the office under the provisions of this act, and shall possess the same powers and duties as sealers appointed under the provisions of this act."

As stated, plaintiff had prior to this legislative act, under an ordinance duly passed by the city, been appointed deputy sealer of weights and measures for the city of Los Angeles and his salary fixed at ninety dollars per month. Whether appointed under the act of the legislature of 1911, or in the absence thereof, is immaterial, since it has been held that even in the absence of such express provision an ordinance providing for the appointment of such official would constitute a valid exercise of the police power conferred on municipalities by section 11 of article XI of the constitution. (*Scott v. Boyle*, 164 Cal. 321, [128 Pac. 941].)

The Weights and Measures Act, section 17 of which provides that such deputy shall receive as salary the sum of five dollars per day, went into effect August 10, 1913, and the contention of plaintiff is that, while his salary was, under and by virtue of the city ordinance, fixed at ninety dollars per month, such provision continued in force only to the time when the provisions of the statute became effective, to wit: August 10, 1913; that such provision of the statute superseded the ordinance and fixed his salary at five dollars per day, the result of which, since he was entitled to salary at the rate of ninety dollars per month up to the tenth day of August and five dollars per day for the balance of the month, entitled him to compensation for services performed during the month in the sum of \$117.69, and having received ninety dollars, left a balance due him of \$27.69.

The question thus squarely presented is whether or not plaintiff is entitled to compensation under such city ordinance or under and by virtue of the provisions of section 17 of the Weights and Measures Act. As stated, Los Angeles operates,

under a freeholders' charter, provisions for the adoption of which, as well as the amendment thereof, are found in section 8 of article XI of the constitution. The office of sealer of weights and measures is not one designated in the charter. By its terms, however, the city is empowered to provide for the election or appointment of officers other than those designated in the charter and prescribe their duties and fix their compensation. Section 66 expressly provides that "The city council shall by ordinance fix the salary of all other officers herein, or by ordinance hereafter created, whose salaries are not hereby fixed or otherwise provided for." Appellant insists there must be an express delegation of control as to the powers exercised by the city in order that such exercise should constitute municipal affairs, within the meaning of the term as used in section 6 of article XI of the constitution. Conceding this to be true, the charter in the clearest terms gives the city the power to fix the compensation of all municipal officers. "The compensation of a municipal officer is purely a municipal affair, . . . and the charter provisions upon that subject are exclusive and conclusive." (*Trefts v. McDougald*, 15 Cal. App. 584, [115 Pac. 655]. See, also, *Graham v. Mayor*, 151 Cal. 465, [91 Pac. 147]; *Popper v. Broderick*, 123 Cal. 456, [56 Pac. 53]; *Fragley v. Phelan*, 126 Cal. 386, [58 Pac. 923]; *Elder v. McDougald*, 145 Cal. 740, [79 Pac. 429].) This is true whether the duties of the office are exacted by the charter or be imposed by the general law of the state. (*Matter of Dodge*, 135 Cal. 512, [67 Pac. 973].) If, therefore, the office, for the performance of the duties of which petitioner seeks compensation, be a municipal office, then he is entitled only to such salary as the city may by ordinance have provided. To hold that the legislature possessed authority to enact laws fixing the compensation of such office to be paid out of the municipal funds, would be conceding to such body the power to amend a freeholders' charter contrary to the provisions of section 8 of article XI of the constitution.

If, on the other hand, the services rendered by petitioner were those required to be performed for and on behalf of the state, such fact would render the position a state office. And, notwithstanding the duties in performance are restricted to the city, they do not, merely by reason thereof, become municipal in character. (*Fleming v. Hance*, 153 Cal. 162, [94 Pac.

620].) As to the salary of such office, the legislature cannot impose the payment thereof upon a city the organic law of which is a freeholders' charter. "The legislature is not empowered to direct the appropriation of municipal funds for the payment of the salary or office expenses of one who is simply a county or township officer." (*Graham v. Mayor*, 151 Cal. 465, [91 Pac. 147].) "We are not aware that it has ever been held, . . . that the legislature has power to appropriate the funds of a municipality to the discharge of an obligation against the entire state, or to direct the payment of such funds for any other purpose than pertains to the municipality itself." (*Conlin v. Board of Supervisors*, 114 Cal. 404, [33 L. R. A. 752, 46 Pac. 279].) In neither view of the case is petitioner entitled to compensation at the rate of five dollars per day for each day actually employed in the service of such city, as provided in section 17 of the Weights and Measures Act.

As we construe the act, it seeks to provide a uniform system for the regulation of the measurement and graduation of merchandise, manufactured articles, and commodities sold and manufactured throughout the state, provides for the appointment of a state sealer of weights and measures, and makes it compulsory upon the board of supervisors of the various counties to appoint a sealer of weights and measures or apply to the state sealer to assign a deputy to such county, and delegates to the legislative bodies of the various cities of the state the power, the exercise of which is optional, to appoint a sealer of weights and measures for such city. While not compelled to make such appointment, they may do so, in which case, as provided by section 19 of the act, the officer in the performance of his duties is controlled by the Weights and Measures Act, and any violations of the provisions of the law become misdemeanors to be prosecuted by state officials. The delegation to cities of such power, to be exercised at their discretion, is, as we construe the law, the same as though the charter had in express terms made provision therefor, and it becomes a municipal affair to the extent that the making of such appointment and the fixing of such official's compensation is a matter solely within the control and right of the municipality.

Judgment affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1460. Second Appellate District.—September 25, 1914.]

H. P. CONNER, Respondent, v. MARY D. PLANK, Appellant; DELMER E. PLANK, Defendant.

CONTRACTS—NECESSITY OF REDUCING TERMS TO WRITING.—When it is a part of the understanding between parties in negotiating the terms of an agreement that it is to be reduced to writing and signed by them, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract.

ID.—OMISSION TO REDUCE AGREEMENT TO WRITING—WHEN DOES NOT INVALIDATE.—But where a contract is of such a nature that the law does not require it to be in writing, and its terms are in the first instance definitely agreed upon and completed, then the mere fact that immediately thereafter the parties agree to evidence the contract by a written instrument does not interfere with the force and effect of the oral agreement.

ID.—CONTEST OF WILL—AGREEMENT NOT TO WAGE—FAILURE TO PUT IN WRITING.—In this action involving an oral contract not to contest a will there is no evidence that the agreement arrived at from the oral negotiations of the parties was not to constitute a contract unless completed in writing, although the next day after the agreement was reached the attorneys of the parties started to put it in writing, whereupon one of the parties repudiated the compromise and the preparation of the writing was thereupon suspended.

APPEAL from a judgment of the Superior Court of Los Angeles County. W. M. Conley, Judge presiding.

The facts are stated in the opinion of the court.

Richard J. Culver, for Appellant.

Roy V. Reppy, for Respondent.

CONREY, P. J.—Appeal from judgment in favor of plaintiff. The findings of fact in this case state that on September 8, 1911, the plaintiff entered into an agreement with the defendant Mary D. Plank whereby the defendant agreed to pay to plaintiff one-half of certain moneys theretofore received by her from F. W. Partridge, and also to pay to plaintiff on the distribution of the estate of said Partridge deceased, one-half of the net value of said estate as the same should be distributed to her; that in consideration of said

agreement on the part of defendant, the plaintiff agreed to obtain forthwith an assignment to him of all interest of his mother Mary Abigail Conner in the said estate, she being the sole heir at law of said Partridge, deceased, at the time of his death; and plaintiff further agreed not to institute any proceedings for the contest of the will of said deceased and to relinquish to defendant all claims of his said mother in and to the property of said Partridge, deceased, and of his said estate.

It is further found that the plaintiff performed all of the terms of the contract made by him, and that the defendant has neglected and refused to perform her part of said contract, although the entire estate was distributed to her and no contest of the will was made.

There is no dispute as to the correctness of the amount of the judgment, if plaintiff is entitled to recover anything. The only questions presented have reference to the sufficiency of the evidence to support the findings which were made in favor of plaintiff as to the making of the contract.

F. W. Partridge died in Los Angeles County, leaving an estate in that county, and there his alleged will was offered for probate. According to the terms of said will the entire estate was given to the defendant (who was not an heir at law of the decedent), except that the sum of ten dollars was bequeathed to the plaintiff. The plaintiff came to Los Angeles from an eastern state and on behalf of his mother was preparing to contest the alleged will. He engaged as his attorney Gurney E. Newlin, and the defendant was represented by Samuel M. Haskins, also an attorney at law. In the testimony of Mr. Newlin and Mr. Haskins there is ample evidence that the terms of the alleged agreement were fully understood between them; they are the terms which were offered by Mr. Newlin and accepted by Mr. Haskins. No question exists as to the authority of Mr. Newlin to represent the plaintiff. On the other hand, it appears that Mrs. Plank stated in the presence of Newlin that she would do anything that Mr. Haskins advised her to and that any agreement that Mr. Haskins reached with Newlin was satisfactory to her. The testimony of Haskins shows that Mrs. Plank was fully informed about the terms of the agreement; that later in the day she expressly gave her sanction to the same in a telephone message to Haskins, and that Haskins thereupon informed

Newlin of his understanding that the matter was to be settled upon the basis already outlined.

The principal question of law on this appeal arises out of the fact that arrangements were made for reducing the agreement to writing and the writing was not completed or signed. There is no evidence of any statement made that the result which had been arrived at from the negotiations was not to constitute a contract unless completed in writing. In proposing to put the terms in writing it was assumed that they had been agreed upon. Newlin suggested to Haskins that it would be advisable to put the terms of the agreement that had been reached, in writing. These transactions took place on September 8, 1911. On the morning of September 9th the attorneys met at the office of Haskins and commenced the dictation of the proposed written instrument. While they were so engaged Mrs. Plank communicated with Haskins by telephone and informed him that, having discussed the matter with some friends, she had decided that she would enter into no compromise whatever. The preparation of the writing was thereupon suspended and was never resumed.

Counsel for appellant relies upon the proposition that where parties have agreed to reduce an understanding to writing, that it never becomes a binding agreement until it is written and is signed by the parties to it. The principal cases relied upon in support of appellant's position are *Pacific R. & M. Co. v. Riverside etc. Railway Co.*, 90 Cal. 632, [27 Pac. 525]; *Spinney v. Downing*, 108 Cal. 666, [41 Pac. 797], and *Las Palmas Winery and Distillery v. Garrett & Co.*, 167 Cal. 397, [139 Pac. 1077] (March 17, 1914). These cases go no further than to establish the rule that, when it is a part of the understanding between the parties in negotiating the terms of their contract that the same be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract. The record in each of the three cases above cited showed that the parties understood that the agreements were not to become binding upon either until evidenced in the written form. When the facts are as last stated, the rule relied upon here by the appellant will apply; but where, on the other hand, the contract is of such a nature that the law does not require it to be in writing and the terms of the contract are in the first instance

definitely agreed upon and completed, then the mere fact that immediately thereafter they agree to evidence the contract by a written instrument does not interfere with the force and effect of the oral agreement.

Upon the other points mentioned in appellant's brief we find evidence sufficient to support the finding that the parties to the contract had been definitely ascertained; that the attorneys did have authority to bind their principals; and that the contract contained definite promises on each side sufficient to constitute a legal consideration.

The judgment is affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1515. Second Appellate District.—September 25, 1914.]

HENRIETTA DAVIES, Respondent, v. JOHN STARK, et al., Defendants; H. L. SUYDAM, Appellant.

APPEAL—ORDER REFUSING NEW TRIAL—RECORD NOT SHOWING GROUNDS OF MOTION.—An order denying a motion for a new trial will be affirmed on appeal if the record does not disclose the grounds upon which the motion was made.

ID.—REGULARITY OF PROCEEDINGS—PRESUMPTION ON APPEAL.—On appeal every presumption is in favor of the regularity of the judgment and the proceedings upon which it is based, and to justify a reversal it devolves upon the appellant to affirmatively show error.

ID.—FORCIBLE ENTRY AND DETAINER—GIST OF ACTION—SUFFICIENCY OF COMPLAINT.—An allegation of forcible entry alone, unaccompanied by an allegation showing that defendant detains possession of the premises so forcibly entered, will not warrant an action under the provisions of chapter IV, title III of the Code of Civil Procedure, for forcible entry and detainer. The real gist of the action is the detention of the premises.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

M. O. Graves, for Appellant.

Birney Donnell, and Willoughby Rodman, for Respondent.

SHAW, J.—Action for forcible entry. The complaint alleges that plaintiff, on October 31, 1913, was in the peaceable possession of a certain store-room, at which time defendants forcibly entered therein and in a forcible manner ejected the plaintiff from the premises and broke the doors, locks, and windows of said storeroom, all to her damage in the sum of five hundred dollars; that the monthly rental value of the property is forty dollars. There is an absence of any allegation that any of the defendants detained possession of the property; indeed, from all that appears to the contrary in the complaint, plaintiff may have immediately upon the commission of the acts attributed to defendants, resumed possession of the premises and held the same at the time of instituting the action.

To this complaint Suydam, the appellant, filed a separate answer, admitting that plaintiff was, on October 31, 1913, in the peaceable possession of the property, but denied that he entered the premises in any manner, or ejected the plaintiff therefrom, or did any of the acts charged in the complaint to have been done by defendants.

The court found the facts as alleged in the complaint, namely: that defendants forcibly broke the doors and locks of the storeroom, entered therein and ejected plaintiff who was in the peaceable possession thereof, all to her damage in the sum of \$26.25, for treble the amount of which sum judgment was rendered for plaintiff. Suydam appeals from the judgment and an order denying his motion for a new trial.

The record discloses that a bill of exceptions was prepared and settled, to be used in support of defendants' motion for a new trial, and also shows the motion as made to have been denied. This order must be affirmed for the reason that the record does not disclose the grounds upon which the motion was made; hence it is impossible to say the court erred in the ruling.

No attack is made upon the findings, and while the bill of exceptions discloses no evidence showing that plaintiff was damaged in any sum whatsoever, or that defendants detained possession of the property, we must, since the bill of

exceptions does not purport to contain all of the evidence, but only such parts of the record upon which defendants based their claim for a new trial, indulge in the presumption that there was sufficient evidence adduced to justify the court in making the finding. Every presumption is in favor of the regularity of the judgment and proceedings upon which it is based, and to justify a reversal it devolves upon appellant to affirmatively show error.

The only question to be reviewed upon the record as presented is the sufficiency of the complaint. As to this, we think what was said in the case of *Bell v. Haun*, 9 Cal. App. 41, [97 Pac. 1126], is determinative of the question. The facts in the case there were almost identical with those here presented. It was there said: "An allegation of forcible entry alone, unaccompanied by an allegation showing that defendant detains possession of the premises so forcibly entered, will not warrant an action under the provisions of chapter IV, title III of the Code of Civil Procedure, for forcible entry and detainer, (*Castro v. Tewksbury*, 69 Cal. 562, [11 Pac. 339]; *Preston v. Kehoe*, 10 Cal. 445; *Armstrong v. Hendrick*, 67 Mo. 542; *Merrill v. Forbes*, 23 Cal. 379.) In the absence of such allegation a fact necessary to constitute the cause of action must be taken as having no existence. (*Hildreth v. Montecito Creek W. Co.*, 139 Cal. 22, [72 Pac. 495].) While it appears from the complaint that plaintiff was in the actual and peaceable possession of the premises, and that defendants did wrongfully and unlawfully turn the plaintiff out of the possession thereof, it nowhere appears that defendants detained or withheld possession of the premises from plaintiff at the commencement of the action." It is made the duty of the court, under section 1174 of the Code of Civil Procedure, if the finding of the court be in favor of plaintiff, to enter judgment for the restitution of the premises, but to warrant such judgment it must appear from the complaint that defendants withheld the premises from plaintiff. It was further said in *Bell v. Haun*, 9 Cal. App. 41, [97 Pac. 1126]: "The real gist of the action is the detention of the premises, from the one entitled thereto, and this whether the detainer be forcible as defined by section 1160 of the Code of Civil Procedure, or unlawful, within the meaning of section 1161, or the retention of possession without force and violence by one who has by force and violence en-

tered upon the possession of another." In 19 Cyc., p. 1156, it is said: "In all actions, brought under forcible entry and detainer statutes, it is necessary to allege a detention of the premises at the time of the institution of the action; for, in the absence of such detention, the complaint would amount to no more than a trespass." As frequently said, pleadings must be construed most strongly against the pleader, and so regarded the allegations of the complaint in this case are entirely consistent with the fact that defendants broke the doors and windows, ejected plaintiff from the storeroom and immediately thereafter departed from the premises.

In our opinion, the complaint is insufficient to sustain the judgment rendered, and it is, therefore, reversed.

Conrey, P. J., and James, J., concurred.

[Civ No. 1504. Second Appellate District.—September 25, 1914.]

W. K. FOGG, Appellant, v. JAMES McADAM, Respondent.

BROKERS—EXCHANGE OF LANDS—WITHDRAWAL OF WRITTEN AUTHORIZATION—SERVICES RENDERED UNDER ORAL REQUEST.—Where a broker's written authorization to negotiate an exchange of city property for a certain ranch is withdrawn, and he is orally requested to secure an exchange of a part of the ranch upon different terms, his subsequent rendition of services will not entitle him to commissions. When the written authorization was withdrawn the relations between the broker and his principal were as though the writing had never been executed; hence there was no written authority to modify, and the alleged oral contract was therefore an original agreement governed by the provisions of section 1624 of the Civil Code, which requires such contracts, in order to enable the broker to recover, to be in writing.

ID.—CONTRACT TO EXCHANGE LANDS—ORAL MODIFICATION.—Where a broker's contract is for the exchange of specific property, not a general authorization to sell, there can be no oral modification of the agreement.

ID.—ACTION FOR COMMISSIONS—NECESSITY OF ALLEGATION AS TO TITLE OF PROPERTY.—A complaint in an action by a real estate broker to recover his commissions for negotiating an agreement to exchange lands is insufficient, under the rule that pleadings are to be construed most strongly against the pleader, if it does not allege that

the property to be conveyed to his principal was free from encumbrance and that such fact was evidenced by a certificate of title, when the contract (never consummated) contemplates such a title and certificate.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

A. W. Sorenson, for Appellant.

J. H. Merriam, for Respondent.

SHAW, J.—Action to recover a broker's commission for negotiating an exchange of real estate.

The sole question involved is the ruling of the court in sustaining a general demurrer to the complaint. Upon the making of the order and plaintiff's declining to amend, judgment was entered for defendant, from which plaintiff prosecutes this appeal.

The complaint alleges that on May 11, 1911, defendant in writing authorized Merrill & Fogg, plaintiff's assignors, to negotiate an exchange of certain real estate then owned by him for certain ranch property, consisting of four hundred and eighty acres, owned by one W. E. Premo. The written authorization, as set forth in the complaint, is as follows:

"Pasadena, Calif., May 11, 1911.

"**Mrs. MERRILL AND FOGG,**

"Gentlemen: As per agreement to make you a definite offer on the Premo Ranch of 480 acres, will make the following offer: First, said Premo to take the property shown him on Colorado Street for \$50,000 and I retain a portion of lot No. 2, in the rear and give him right of way across the rear of lot No. 1 so that he would have access to the rear of his buildings, also house and of lot on Morningside Ave., east of Huntington Drive, lot No. 15, Culver Subdivision, and assume the mortgage on his ranch for \$10,000 and \$8000.00 in cash within sixty days, and also \$900 commission. This offer is made subject to again looking over the ranch within one week from the above date.

"(Signed) **JAMES McADAM.**"

That thereupon Merrill & Fogg undertook the negotiation of an exchange and endeavored to induce said Premo to accept the offer and make the exchange of the properties described as proposed by defendant. Not only is there a failure to allege the acceptance of the offer on the part of Premo, but it is alleged that defendant, as he reserved the right to do, inspected the property of Premo within a week after the date of making the proposal and withdrew the same. Thereafter, as alleged in the complaint, defendant orally requested plaintiff's assignors to secure Premo's consent to an exchange of a part of the ranch (being the property described in the within authorization, less 80 acres) upon other and different terms and considerations than those specified in the withdrawn written proposal made by defendant. That pursuant to this request, plaintiff's assignors did bring defendant and Premo together and as a result of their efforts defendant and Premo entered into a written contract for the exchange of certain properties other than those described in the written authorization so withdrawn by defendant, and upon other and entirely different terms and conditions from those therein specified.

Clearly the written authorization cannot be deemed a basis for recovery for the reason: 1. That it is not alleged that Premo ever accepted defendant's offer; and 2. It is alleged that defendant upon looking the land over withdrew the offer, as he had a right to do. Under the written authorization the employment was not general, but, at most, contemplated the exchange of specific properties and upon certain specified terms. Conceding that plaintiff's assignors were instrumental in bringing about the execution of a contract between defendant and Premo for the exchange of their properties, such service was not rendered pursuant to any contract or memorandum in writing authorizing them to perform such service. (*Smith v. Post*, 167 Cal. 69, [138 Pac. 705].) Appellant insists that the oral request, under and in accordance with which the service was rendered, is sufficient when considered as a modification of the writing. When the written proposal was withdrawn the relations between defendant and plaintiff's assignors were precisely as though the writing had never been executed; hence there was no written authority to modify, and the alleged oral contract was therefore an original agreement governed by the provisions of section 1624

of the Civil Code, which requires such contracts, in order to enable the broker to recover, to be in writing. Moreover, where the contract, as here alleged, is for the exchange of specific property and not a general authorization to sell, there can be no oral modification. "Were it possible to make an oral modification of a contract which by the statute of frauds is required to be in writing and enforce such oral modification, the door would be open for the perpetration of such frauds as the statute seeks to prevent." (*Boyd v. Big Three Ranch Co.*, 22 Cal. App. 108, [133 Pac. 623].)

We think the complaint also defective in that the contract (never consummated) contemplated that Premo's property should be free of all encumbrance other than as therein stated, which fact was to be evidenced by a certificate of title delivered to defendant with deed. It is not alleged that the property was free from such encumbrance, neither is it alleged that Premo furnished such certificate of title; hence, since pleadings are to be construed most strongly against the pleader, defendant's alleged unwillingness to consummate the exchange may have been due to failure of Premo's title, or existing encumbrance upon the property. (*Connor v. Riggins*, 21 Cal. App. 756, [132 Pac. 849].) The alleged consent of defendant that Premo might rescind may have been due to the latter's inability to comply with the terms of the contract.

Judgment affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1594. Second Appellate District.—September 25, 1914.]

HORACE SLATER, Appellant, v. S. A. SELOVER,
Respondent.

JUDGMENT BY DEFAULT—MOTION TO VACATE—GRANTING ON INSUFFICIENT GROUNDS.—An order vacating a default judgment, which has been entered against a defendant for failure to plead within the time prescribed by law, is erroneous, if the affidavits in support of the motion therefor merely aver that the defendant, when served with summons, expected to be engaged in business out of town and turned

the papers over to his business partner with instructions to have the action defended, and that the latter placed them in a pigeon-hole "and through mistake, inadvertence and excusable neglect did not have an answer put in."

ID.—AFFIDAVIT OF MERITS—WHEN INSUFFICIENT.—In such case an affidavit of merits is insufficient, which avers "that affiant has a good and meritorious defense to said action, and wishes to defend same, and that affiant has stated his defense to his attorney, who informs him that he has a good defense to said action." The affidavit should show that the defendant stated all the facts of the case to his attorney, not merely those constituting his defense.

APPEAL from an order of the Superior Court of Los Angeles County setting aside a default. Paul J. McCormick, Judge.

The facts are stated in the opinion of the court.

Eugene C. Campbell, for Appellant.

Dysert & Gunn, and Jay Briggs, for Respondent.

SHAW, J.—This is an appeal from an order of court granting defendant's motion to set aside his default and vacate the judgment entered thereon.

Defendant was duly served with summons and neglected to plead within the time prescribed therefor. Whereupon his default for such failure was entered by the clerk, followed by the entry of judgment on February 27, 1914. On March 23d following, pursuant to notice thereof duly given, defendant, upon the grounds that he had a good and meritorious defense and that his failure to plead was due to mistake, inadvertence, and excusable neglect, moved the court to vacate the judgment and set aside the default and permit him to answer. This motion was supported by defendant's affidavit to the effect that, when served with summons, he expected to be engaged in business out of town, by reason of which fact he gave the papers to one Whipple, his business partner, and instructed him to attend to the matter and have the action defended; and supposing Whipple had followed his instructions he dismissed the subject from his mind and did not discover such omission to answer until after default was entered. Whipple's affidavit filed in support of the motion corroborates that of Selover, in addition to which he merely avers

that, upon the papers being delivered to him by Selover, he placed them in a pigeonhole, "and through mistake, inadvertence and excusable neglect did not have an answer put in said case, and forgot all about said action until March 12th."

We think the averments of the affidavit wholly insufficient to sustain the ruling of the court. At the very most, disregarding the conclusion, since no other facts are stated from which the court could find that defendant's omission was due to mistake, inadvertence, and excusable neglect, it appears the defendant intrusted and delivered the papers to Whipple, instructing him to have the action defended, and Whipple, as he says, "forgot all about said action." It would be difficult to conceive of a case possessing less merit.

However this may be, the order is erroneous for the reason that no sufficient affidavit of merits was presented, without which the order could not be made. (*Nevada Bank v. Dressbach*, 63 Cal. 324; *Quan Quock Fong v. Lyons*, 20 Cal. App. 668, [130 Pac. 33].) The only statement as to merits is contained in the affidavit of defendant, wherein he avers "that affiant has a good and meritorious defense to said action, and wishes to defend same, and that affiant has stated his defense to his attorney who informs him that he has a good defense to said action." Such statement has been repeatedly held to be insufficient as an affidavit of merits. (*Nickerson v. California Raisin Co.*, 61 Cal. 268; *People v. Larue*, 66 Cal. 235, [5 Pac. 157]; *Cooper-Power v. Hanlon*, 7 Cal. App. 724, [95 Pac. 678]; *Phillips v. Logan*, 18 Cal. App. 287, [122 Pac. 1096].) Not only does the affidavit limit the facts stated by defendant to his attorney to those constituting his defense, but such defense as stated may have been purely technical and without any merit whatsoever. Such affidavit should have shown that defendant stated all the facts of the case to his attorney, and not merely those constituting his defense.

The order is reversed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1521. First Appellate District.—September 26, 1914.]

LOUIS D. STOFF, Respondent, v. IRMA M. ERKEN et al.,
Appellants.

DIVORCE—AGREEMENT ADJUSTING PROPERTY RIGHTS—VALIDITY WHEN EXECUTED DURING TRIAL.—An agreement by the parties to an action for divorce, made during the trial, that the case be submitted on the evidence then in, and that the husband abandon to the wife real estate standing in her name but claimed by him to be community property, upon her executing to him a mortgage on the property, is valid, and the mortgage becomes a proper subject of foreclosure upon default in payment.

ID.—CONSIDERATION FOR CONTRACT—WITHDRAWAL OF DEFENSE TO DIVORCE.—The rule that where an agreement between husband and wife is founded upon a consideration to withdraw or abandon a defense to a suit for divorce, or to do anything to facilitate procuring the same, it is illegal and void, is not applicable to such case.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

James L. Nagle, and P. B. Nagle, for Appellants.

Louis H. Brownstone, for Respondent.

KERRIGAN, J.—This is an action by the plaintiff, the assignor of Charles H. Erken, to foreclose a mortgage on real property. Judgment went in favor of the plaintiff; and this appeal is from that judgment and from an order denying defendant's motion for a new trial.

There were two defenses interposed to the action: 1. That the defendant was induced to sign the note and mortgage by reasons of misrepresentations of Charles H. Erken, and 2. That defendant did not receive any consideration for the same. The only way in which it was sought to establish these defenses was by attacking the validity of a settlement of the property rights of the defendant and Charles H. Erken theretofore had in a divorce proceeding pending between them, in

which settlement the real property involved in the present mortgage, although standing in the name of the defendant, was claimed by Charles H. Erken to be community property, but was abandoned to the defendant upon her executing the note and mortgage in suit. The validity of that settlement is the only question raised by the appellant in support of her appeal.

Prior to the commencement of the present action the defendant Irma M. Erken had filed a suit against her husband, Charles H. Erken, for a divorce, alleging several grounds. Erken answered, and also filed a cross-complaint alleging cruelty and adultery. He also sought in a separate action, but which was tried with the action for divorce, to have the real property involved in the present suit, and which was standing of record in the name of his wife, declared to be community property. In due time an answer to the cross-complaint was filed and the case went to trial. Plaintiff had completed her case in chief, and the defendant had introduced considerable testimony to sustain the allegations of his answer and cross-complaint, when the trial of the case was halted by negotiations of settlement of the property rights of the parties. An agreement was reached and executed under the terms of which the real estate above referred to was agreed to be the property of the wife upon her executing to the husband the note and mortgage in suit.

An epitome of the testimony on the subject is as follows:

Louis H. Brownstone, the attorney for Charles H. Erken in the divorce suit, testified as to the agreement of settlement between Erken and his wife. In his testimony he states that, after the trial had been in progress two or three days and during an adjournment, Mrs. Erken's attorney, Mr. Eisner, called on him and discussed the testimony already introduced; that he stated to Mr. Eisner that the real property involved would undoubtedly under the evidence submitted in the case be assigned to his client absolutely, the testimony as to the wife's adultery being conclusive; that Mr. Eisner practically admitted that such testimony was irrefutable. Continuing, this witness stated: "Mr. Eisner at that time tried to prevail on me to dismiss this charge of adultery and permit Mrs. Erken to get a divorce on the ground of desertion, or some such ground as that; but we absolutely refused to do

anything except to submit the case on the testimony as it then stood. I told Mr. Eisner that I was satisfied that if the case was submitted as it then stood, or even if it went further, there wasn't any question about the fact that the judge would grant the divorce on the ground of adultery."

Mr. Eisner also appeared as a witness and testified with regard to the settlement between Erken and his wife. He said: "The action was to be submitted on the testimony then in. The cross-complaint was on the ground of adultery. The cross-complainant had put in quite a bit of evidence to sustain the charge. . . . It was then agreed that the case was to be submitted; and further it was to be conceded by the cross-complainant that the property was the separate property of Mrs. Erken. The note and mortgage for five thousand dollars was to be signed by Mrs. Erken. Then Charles Erken was to get the decree of divorce. The case was to be submitted to the court to make its ruling. It was assumed, however, from the evidence then in that the court could not rule otherwise than to give judgment to Charles H. Erken. . . . In the negotiations we asked for one-half the value of the property; we asked one-half in settlement. The cross-complainant through Mr. Brownstone refused to give one-half, and the matter was contested and was in court for a long time. As a counter-proposition and after some negotiations and after a number of meetings, Mr. Brownstone made the proposition for his client that they were willing to accept \$5,000 and Mrs. Erken keep the property. . . . Mrs. Erken said 'Yes.' In that conversation we spoke purely, as I recall it, about property rights."

Under section 158 of the Civil Code a husband or wife may enter into any engagement or transaction with the other respecting property which either might if unmarried. The contract in this case seems free from any taint affecting its validity. True it has been repeatedly held that where an agreement between husband and wife is founded upon a consideration to withdraw or abandon a defense to a suit for divorce, or to do anything to facilitate procuring the same, it is illegal and void (*Loveren v. Loveren*, 106 Cal. 509, [39 Pac. 801]; *Beard v. Beard*, 65 Cal. 354, [4 Pac. 229]); but those cases have no application to the facts in this case; nor do we find that by the agreement of settlement complained of any fraud

was practiced upon the court, before which the divorce suit was tried.

The judgment is affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 25, 1914.

[Civ. No. 1572. Second Appellate District.—September 26, 1914.]

ALTON M. CATES, Appellant, v. CONSOLIDATED REALTY COMPANY (a Corporation), Respondent.

CORPORATIONS—DIVIDENDS ON ATTACHED STOCK—TO WHOM BELONG.—

All dividends accruing from attached stock are impounded with the stock itself, and pass with it to the execution purchaser.

Id.—RIGHT TO DIVIDENDS—WHEN STANDS SEPARATE FROM STOCK.—But the right of the execution purchaser to the dividends remains separate from the stock.

Id.—ASSIGNMENT OF STOCK—RIGHT TO DIVIDENDS.—Hence a mere assignment of the stock by the execution purchaser does not pass any interest in past dividends or any right of action thereon.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge.

The facts are stated in the opinion of the court.

Cates & Robinson, and Stewart & Stewart, for Appellant.

Jones & Weller, for Respondent.

CONREY, P. J.—In this action judgment was entered in favor of the defendant after an order had been made sustaining a general demurrer to the complaint without leave to amend. Plaintiff appeals from the judgment.

In a certain action in the superior court, wherein Vickrey and another were plaintiffs, and Maier and another were defendants, an attachment was issued and regularly served upon

the defendant corporation, covering certain shares of stock belonging to the defendants in that action. The plaintiffs obtained judgment and at an execution sale by the sheriff they purchased said shares of stock and received a certificate of purchase, thereby becoming the owners of the stock. Between the date of the attachment and the time of the execution sale several dividends were declared by the corporation, some of which were paid to the defendants in the attachment suit, and one of which remains unpaid.

After the plaintiffs in the former action had purchased the stock at the sheriff's sale they transferred to this plaintiff "all their right, title, and interest in and to said 34 shares of the stock above described, and all thereof." No assignment to plaintiff is alleged, except as shown by the language quoted in the preceding sentence.

The position stated by appellant is that the right to dividends inheres in shares of corporate stock, and is held under levy of attachment on the shares and passes to the execution purchaser of shares attached. With this contention we agree, and it is not denied by the respondent. In *McCarthy Co. v. Boothe*, 2 Cal. App. 170, [83 Pac. 175], this court declared that all of the profits and dividends to accrue from attached stock are impounded equally with the stock itself. (See, also, Cook on Corporations, 5th ed., sec. 484.)

It is suggested, however, that the plaintiff cannot recover because the assignment under which he claims did not include any interest in past dividends. The transfer to him was of the stock only and he took the stock as it stood. With this contention we agree. The plaintiff's position is precisely the same as if, without any attachment, the stock had been transferred by the owners thereof to the plaintiff after these dividends were declared. The fact that plaintiff's assignors might have maintained this action, is of no benefit to plaintiff, since it is not shown that they transferred to plaintiff anything more than the stock as it stood when assigned to plaintiff. When the dividends were declared they became a personal debt from the corporation to the defendants Maier et al., but remained subject to the lien of the attachment. The execution sale, therefore, carried to the purchasers the right to these dividends, but this right retained its character as a right to the benefit of declared dividends and remained separate from the stock. Therefore, the mere assignment of the

stock did not carry with it a right of action on the dividends. (10 Cyc. 557; Cook on Corporations, 4th ed., sec. 539; *Hopper v. Sage*, 112 N. Y. 530, 8 Am. St. Rep. 771, [20 N. E. 350].)

The demurrer was properly sustained, and the judgment is affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1219. Third Appellate District.—September 26, 1914.]

**F. H. MANSS, Petitioner, v. THE SUPERIOR COURT OF
MENDOCINO COUNTY, Respondent.**

CRIMINAL LAW—RESISTING AN OFFICER—TAKING POSSESSION OF ATTACHED GOODS.—An indictment charging that the defendant did “willfully, unlawfully, and knowingly resist, delay, and obstruct a public officer named C, who was” a constable of a certain township, engaged in executing a writ of attachment issued out of a designated justice’s court in a specified case, under which he was in possession of certain ties; and that the defendant, “by force and violence and against the will of said officer did take a portion of the said ties” from his possession, sufficiently charges the offense of resisting an officer as defined and condemned by section 69 of the Penal Code.

1b.—JURISDICTION OF SUPERIOR COURT TO TRY OFFENSE.—Such charge is not within section 102 of the Penal Code, which makes it a misdemeanor to retake goods from the custody of an officer, and the superior court has jurisdiction to try it.

1d.—SECTIONS 69 AND 102 OF PENAL CODE—DISTINCTION.—Section 102 of the Penal Code refers to interference with an officer where no force or violence is employed. Neither the term force nor violence is used in that section, while in section 69 an essential element is a “threat” or “force” or “violence.”

APPLICATION for a Writ of Prohibition to be directed against the Superior Court of Mendocino County.

The facts are stated in the opinion of the court.

Mannon & Mannon, for Petitioner.

J. Charles Jones, Deputy Attorney-General, for Respondent.

BURNETT, J.—This is an application for a writ of prohibition to restrain respondent from trying petitioner on an indictment found by the grand jury of said county. The charging part of the indictment is as follows: "The said F. H. Manss on or about the 20th day of October, A. D. 1913, at the county of Mendocino, state of California, and before the finding of this indictment did then and there willfully, unlawfully and knowingly resist, delay and obstruct a public officer named M. M. Curtis, who was then and there a duly elected, qualified and acting constable of Big River Township, said county of Mendocino, state aforesaid, who was then and there in the discharge of and attempting to discharge his duty as such constable, being then and there engaged in the execution of a writ of attachment duly and regularly issued out of the justice court of Big River Township in said county of Mendocino, in the case wherein Mrs. Oddie Osborne was plaintiff and H. H. Ashley and George Ashley were defendants, under which said writ of attachment said M. M. Curtis as constable as aforesaid was in the possession of a certain lot of ties which he had attached under said writ, and said defendant did then and there willfully, unlawfully and knowingly resist, delay, and obstruct said M. M. Curtis as a public officer as aforesaid, in the discharge of and attempting to discharge his duty as such constable by holding said ties under said attachment, and said defendant by force and violence and against the will of said officer did take a portion of the said ties so in his possession by authority of said writ of attachment as aforesaid from the possession of said officer."

It is thus made plain that the grand jury and the district attorney had in view the offense characterized and condemned by section 69 of the Penal Code as follows: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by fine not exceeding five thousand dollars and imprisonment in the county jail not exceeding five years."

It is clear also that the indictment sufficiently charges said offense. All that is required is to follow substantially the language of the statute. (*People v. Fowler*, 88 Cal. 136, [25 Pac. 1110]; *People v. Craig*, 120 Cal. 281, [52 Pac. 658].)

It is, indeed, apparent that the charge is set forth with greater amplitude than is demanded.

It is not disputed that the superior court has jurisdiction to try the offense contemplated by said section of the Penal Code. The contention, however, is that the charge is brought within the provisions of section 102, as follows: "Every person who willfully injures or destroys, or takes or attempts to take, or assists any person in taking or attempting to take, from the custody of any officer or person, any personal property which such officer or person has in charge under any process of law, is guilty of a misdemeanor." It is further contended that since no punishment is therein prescribed we must look for the penalty to section 19, as follows: "Except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both."

There is no question that of said offense the superior court has no jurisdiction. Said section 102, however, has no application. That is designed for similar interference with the duties of an officer where no force and violence is used. If an individual should surreptitiously or peaceably take personal property from the custody of an officer who had it in charge under process of law he would be guilty of said offense and should be prosecuted in the justice court. It is to be observed that neither the term *force* nor *violence* is used in said section 102, while in section 69 an essential element is a "threat" or "force" or "violence." The difference in the gravity of the offenses is, of course, manifest.

There is, also, it may be said, another section to wit, 148 of the Penal Code, which is general in its terms and applies to interference with or obstruction of *any* public officer in the discharge of his duty, while section 69 is limited to *executive* officers. A constable is manifestly an executive officer, and as the offense is plainly brought under said section 69, there is no merit in this application. The demurrer is sustained and the writ denied.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1281. Third Appellate District.—September 26, 1914.]

SACRAMENTO ORPHANAGE AND CHILDREN'S HOME (a Corporation), Petitioner, v. **JOHN S. CHAMBERS**, as State Controller, Respondent.

ORPHAN ASYLUMS—ALIEN PARENTS—SUPPORT OF CHILDREN—STATE AID—MANDAMUS.—An orphan asylum is entitled to state aid, and may enforce it by *mandamus* against the state controller, for the support of a native-born orphan child of alien parents who have never become citizens but have resided in the state though not for at least three years prior to the application for aid, as provided by section 2289 of the Political Code.

Id.—DISCRIMINATION AGAINST ALIENS—CONSTITUTIONAL LAW.—The provision of section 2289 of the Political Code "that no child whose parent or parents have not resided in this state for at least three years prior to the application for aid, or whose parent or parents have not become citizens of the state, shall be deemed a minor orphan, half-orphan, or abandoned child within the intent and meaning of this chapter," is not in contravention of section 1 of amendment XIV of the constitution of the United States that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," but it is obnoxious to section 21 of article I of the constitution of California that no "citizen, or class of citizens, shall be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

Id.—PRIVILEGES AND IMMUNITIES OF CITIZENS—FOURTEENTH AMENDMENT.—The privileges and immunities of citizens of the United States, protected by the fourteenth amendment, are privileges and immunities arising out of the nature and essential character of the federal government, and granted or secured by the constitution.

Id.—PRIVILEGES AND IMMUNITIES—DEFINITION OF TERMS.—The word privilege, in common acceptation, means some immunity or advantage; it is a particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantage of other citizens. The words privileges and immunities are synonymous or nearly so.

Id.—STATE AID OF ORPHANS—WHETHER CONSIDERED AS CHARITY.—State aid of orphan asylums, under section 2283 of the Political Code, is not to be regarded as a charity, or benevolent gift, but the fulfillment of a legal and moral obligation growing out of the duties and privileges of citizenship.

APPLICATION for a Writ of Mandate to be directed to the State Controller.

The facts are stated in the opinion of the court.

White, Miller, Needham & Harber, Edward F. Moran, and W. H. Barrows, for Petitioner.

U. S. Webb, Attorney-General, and John T. Nourse, Deputy Attorney-General, for Respondent.

BURNETT, J.—This is an application for a writ of mandate to secure the payment of a claim for the support of a minor orphan.

After setting forth that, from the first day of July, 1913, to the twenty-second day of May, 1914, the Sacramento Orphanage and Farm Association was a corporation, and an institution conducted for the support and maintenance of minor orphans, half-orphans and abandoned children, and that during the same period the Sacramento Children's Home was a like institution and conducted for like purposes, and that, on said May 22d, the said organizations duly consolidated and became vested with all the rights, duties, and powers of said component associations and succeeded to and became vested with all the property thereof, the petition proceeds: "That for a period of six months immediately prior to the 31st day of December, 1913, that is to say, from the 1st day of July, 1913, to the 31st day of December, 1913, Sacramento Orphanage & Farm Association did have in its care custody and control one Domic Jurevich, a minor half-orphan under the age of fourteen years, to wit, of the age of seven years or thereabouts; that the parents of said minor half-orphan were aliens and had never become citizens of the United States or of the state of California. That the mother of said minor is dead; that the father of said minor, if alive, would have been a resident of the state of California for more than three years prior to the 1st day of July, 1913; that on August 25, 1912, the father of said minor left Sacramento to visit his native country, intending to return to the state of California; that petitioner is informed and believes that said father of said minor died on the journey to his native country; that said minor was born in the state of California and at the time of his birth his parents were residents of the state of California and continued to be residents of said state up to the time of their death." Then follow allegations as to the proper presentation of petitioner's claim for \$37.50 and its approval by the board of control, the availability of sufficient funds in

the state treasury appropriated by the legislature for the purpose of paying for the support and maintenance of said minor, and the application to respondent for the appropriate warrant and his refusal to draw the same.

The statutory authority upon which petitioner relies is found in section 2283 of the Political Code as amended in 1913 (Stats. 1913, p. 629) as follows: "There is hereby appropriated out of any money in the state treasury not otherwise appropriated, to each and every institution in this state conducted for the support and maintenance of needy minor orphans, half orphans, or abandoned children, and to each and every county, city and county, city, or town maintaining such orphans, half orphans, or abandoned children, or any or all of such classes of persons, aid as follows: For each whole orphan supported and maintained in any such institution, not in excess of one hundred dollars per annum; and for each half-orphan or abandoned child, not in excess of seventy-five dollars per annum."

Such legislation, it may be observed, does not rest its sanction alone upon the general authority of the legislative department of the state government, but it is expressly authorized by section 22 of article IV of the state constitution, as follows: "No money shall be drawn from the treasury but in consequence of appropriations made by law, and upon warrants duly drawn thereon by the controller; and no money shall ever be appropriated or drawn from the state treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the state as a state institution, nor shall any grant or donation of property ever be made thereto by the state; *provided*, that notwithstanding anything contained in this or any other section of this constitution, the legislature shall have the power to grant aid to institutions conducted for the support and maintenance of minor orphans, or half-orphans, or abandoned children, or aged persons in indigent circumstances—such aid to be granted by a uniform rule, and proportioned to the number of inmates of such respective institutions; *provided further*, that the state shall have at any time the right to inquire into the management of such institutions."

Since there is no issue as to the facts set out in the petition herein, there would, therefore, be no difficulty in the way of

granting the relief sought were it not for the following provision of section 2289 of the Political Code, as amended by the said statutes of 1913: "In order that the provisions of this chapter shall not be abused, it is hereby declared: . . . 4. That no child whose parent or parents have not resided in this state for at least three years prior to the application for aid, or whose parent or parents have not become citizens of this state shall be deemed a minor orphan, half-orphan or abandoned child within the intent and meaning of this chapter."

Petitioner herein claims that this particular provision if construed as contended for by respondent is void as opposed to the constitution of the United States and also the constitution of this state. The sections to which petitioner refers are section 1 of amendment XIV of the former and section 21 of article I of the latter. But as to said provision in the federal constitution, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," the interpretation by the courts would preclude it from application to the situation here. In *Duncan v. Missouri* 152 U. S. 382 [38 L. Ed. 485, 14 Sup. Ct. Rep. 571, it was said: "But the privileges and immunities of citizens of the United States, protected by the fourteenth amendment, are privileges and immunities arising out of the nature and essential character of the federal government, and granted or secured by the constitution"; and in *United States v. Moore*, 129 Fed. 632, it is declared: "The question is: Is the right or privilege claimed granted in terms by any provision in the constitution, or so appropriate and necessary to the enjoyment of any right or privilege which the constitution does specify and confer upon citizens of the United States as to arise by necessary implication." The subject is also considered and discussed in the *Slaughter House Cases*, 16 Wall. (U. S.) 36, [21 L. Ed. 394]; *United States v. Cruikshank*, 92 U. S. 542, [23 L. Ed. 588]; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. Rep. 357]; *In re Kemmler*, 136 U. S. 436, [34 L. Ed. 519, 10 Sup. Ct. Rep. 930], and other decisions of the highest court of the country.

The Slaughter House cases especially received the most deliberate consideration, and the court announced the rule to be that "the privileges and immunities of citizens of the United States are those which arise out of the nature and es-

essential character of the national government, the provisions of its constitution or its laws and treaties made in pursuance thereof; and it is these which are placed under the protection of Congress by this clause of the 14th amendment."

Of course, it is difficult, if not impossible, to draw with precision a line which will separate all the privileges and immunities of the citizens of the United States from those of the citizens of the state as such, but it is entirely clear that no provision of the constitution of the United States forms the basis or affords legal sanction for the aid and assistance in question in this controversy. The privilege or benefit herein involved does not grow out of nor does it have any relation whatever to any grant of right or power by the federal constitution. It is purely a state question involving only the construction of the said legislative enactment and of the fundamental law of this state. It is similar in principle to the provisions made for the education of the children of the state at public expense. As to that privilege it was said, through Chief Justice Wallace, in *Ward v. Flood*, 48 Cal. 36, [17 Am. Rep. 405]; "It will be readily conceded that the privilege accorded to the youth of the state, by the law of the state, of attending the public schools maintained at the expense of the state, is not a privilege or immunity appertaining to a citizen of the United States as such; and it necessarily follows, therefore, that no person can lawfully demand admission as a pupil in any such school because of the mere *status* of citizenship." This statement was directed to the contention of petitioner therein that by virtue of said 14th amendment of the federal constitution a citizen of the United States must be accorded the same privileges of admission to the public schools here as is granted to a citizen of this state. Other instances of special favors allowable to citizens of a state could be suggested but sufficient has been said as to this branch of the case.

But the contention of petitioner that said discrimination is obnoxious to section 21 of article I of the state constitution is assuredly entitled to more serious consideration. That section provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

The child for whose support aid is herein sought is a citizen of this state. He was born in this state while his parents were residents thereof. It is undoubtedly true, as stated by respondent, that "Every child born here is a citizen of the state if its parents are residents of the state. Thus, a child born here, whether its parents are citizens or aliens immediately becomes a citizen of the United States, but its second citizenship follows the residence of its parents." The child is and was an orphan under the age of fourteen years and was cared for by such an institution as is contemplated by said statute providing for state aid. What is the basis, then, for discrimination between him and other citizens who are orphans under the age of fourteen years and under the care of the same or of similar institutions? Is it any quality or condition affecting him personally, that would make such classification reasonable and just? Is there any "natural intrinsic or constitutional distinction" differentiating him from the other minor orphan citizens who are receiving and who are entitled to receive state aid? The answer, of course, must be in the negative. The distinguishing quality or condition relates not to him but to his parents. It would be a strange construction of the constitutional provision that would permit privileges to be conferred upon one citizen of the state and withheld from another for the reason that there was a difference in the political *status* of the parents. Mentally, morally, and physically, no doubt, the sins and infirmities of the parents are often visited upon their descendants, but in the realm of civil and political rights and privileges no such principle can be recognized or tolerated. To affirm the proposition contended for by respondent, that one citizen is, and another is *not* entitled to this privilege in consequence of the difference in the citizenship and residence of their parents is to deny all efficacy to the constitutional mandate that privileges and immunities must be granted to *all citizens upon the same terms*.

The purpose of the legislature is unquestionably a commendable one, but it must be accomplished in a legal and constitutional manner. Restrictions affecting all citizens alike might be imposed which would prevent abuse of the privilege and which would be open to no valid objection.

If the condition of residence or of citizenship related to the minor orphan himself it probably could be said that the

classification was just and reasonable and within the purview of the constitution. No doubt the legislature might require the beneficiary to be a citizen of the state and a resident therein for a certain period. If he were not a citizen, said constitutional provision could not, of course, be invoked, and three years might not be an unreasonable requirement as to residence. There would thus be presented in the condition and *status* of the minor a just basis for valid discrimination. But that is entirely different from the requirement here as to the citizenship and residence of the parents. The injustice of the rule contended for could not be more impressively illustrated than in the present instance. If said provision as thus understood is to be enforced no aid can ever be granted to said minor for the reason that death has rendered it impossible for either of his parents to become a citizen or resident for the requisite time. No such arbitrary and extraneous discrimination is sanctioned by our fundamental law.

In the foregoing, we have manifestly assumed that a *privilege* or *immunity* within the contemplation of said constitutional provision is involved in this controversy. However, as to this, there may be some ground for difference of opinion.

The word *privilege*, in common acceptance, means some immunity or advantage. (*Moore v. Fletcher*, 16 Me. 63, [33 Am. Dec. 633].)

A privilege is a particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantage of other citizens. (*Guthrie Daily Leader v. Cameron*, 3 Okl. 677, [41 Pac. 635].)

In its natural meaning, the word privilege may be defined as a right peculiar to an individual or body. (*Ripley v. Knight*, 123 Mass. 515.)

The words *privileges* and *immunities* are synonymous or nearly so; and privilege signifies a peculiar advantage, exemption, immunity, and *immunity* signifies exemption, privilege. (*Van Valkenburg v. Brown*, 43 Cal. 43, [13 Am. Rep. 136].)

Of course, it is not every special favor that may be regarded as a privilege or immunity in the sense of this constitutional provision, but the appropriation of public money would seem clearly to be within the letter and spirit of the expression used. The support and comforts of a home afforded the or-

phan by these benevolent institutions constitute a peculiar benefit or advantage to the recipients, as probably no one would deny. While the aid is not extended by the state directly to the orphan, half-orphan or abandoned child, it is for his benefit, and there can be no difference in principle because the money is appropriated to and used by the intermediary. The essential thing is that it is for the benefit of the dependent. To the extent of applying this money to the beneficent purpose of the law the institution becomes an agent of the state, and it may be said that the statute provides regulations and safeguards to guarantee the faithful discharge of the stewardship.

If it should be said that the terms, "*privileges and immunities*" apply only to rights and benefits that are of constitutional origin, petitioner may still assert its claim on the ground that the duty of the state to aid these helpless minors is affirmed or, at least, recognized in the constitution itself (art. IV, sec. 22), and the legislature is expressly authorized to make the necessary appropriations.

With much plausibility also it might be contended that to give effect to the clause here in controversy as construed by respondent would be in violation of that mandate of said section 22 of article IV, that the aid extended to such institutions must be "granted by a uniform rule, and *proportioned to the number of inmates* of such respective institutions." It could hardly be said that this requirement is observed if some of the orphans or half-orphans who are inmates of such institutions are excluded in making the appropriation.

There is, however, some contention made—worthy of brief notice—that the subject matter in dispute involves a donation or charity and that a donation or charity is not within the constitutional inhibition. It is declared that "the aid extended by sections 2283-2289 of the Political Code is not given in the exercise of any governmental function or constitutional mandate, but is merely a contribution to a private charity under the constitutional permission. No vested right attaches to the grant of aid. 'No pensioner has a vested right to his pension. Pensions are bounties of the government, which Congress has the right to give, withhold, distribute or recall at its discretion.' (*United States v. Teller*, 107 U. S. 68, [27 L. Ed. 352, 2 Sup. Ct. Rep. 39].)"

Even under this conception of the appropriation, however—whatever may be the rule as to the power of Congress or the authority of the legislatures of other states—no such discrimination could be made by our legislature in view of said constitutional prohibition. If it be regarded in the nature of a charity, it would be no less an invidious distinction made between citizens sustaining the same relation to the law.

But the appropriation is not to be regarded in the light of a charity proceeding from merely generous or equitable considerations such as might move a kindly disposed individual to extend a helping hand to one in need of assistance. The modern trend and development of civic ideas is no more emphatically shown than in the unmistakable recognition and expression by statutory and constitutional provisions of the duty of the state to afford assistance and support to the citizens who are not able to support themselves. Whatever may be the condition in other and less advanced countries, the health, comfort, and security of the individual as well as the protection of his property are justly regarded here as proper subjects of legislative promotion. It is the state's duty as the representative of the strong to bear and relieve "the infirmities of the weak." This task cannot be relegated entirely to individual philanthropy. There is no place in our sociology or scheme of government for the brutal philosophy of Nietzsche that "the weak and helpless must go to the wall; and we shall help them to go." The state may honor and glorify the strong and powerful but it recognizes its duty to assist and champion the weak and helpless. This is rightly considered not as a benevolent gift but the fulfillment of a legal and moral obligation growing out of the duties and privileges of citizenship.

It would seem that the only debatable question is whether said provision of the act can be construed so as to harmonize with the constitution, or, if not, whether with the provision eliminated there is any legislative authority left for this appropriation. The duty of the court is, of course, plain and well settled, *to sustain*, if possible, any enactment of the legislature, and if compelled to declare any portion of an act invalid, *to save the balance* if it can be done.

"Constitutions like statutes and private instruments must be so construed if possible as to give some force and effect to each of their provisions. The legal intendment is that each

and every clause has been inserted for some useful purpose, and when rightly understood may have some practical operation. For the purpose of harmonizing apparently conflicting clauses, each must be read with direct reference to every other which relates to the same subject, and so read, if possible, as to avoid repugnancy, and to that end sections, paragraphs and sentences may be transposed; elegance of composition may be sacrificed; and the meaning of words and phrases may be upheld or enlarged." (*French v. Teschemaker*, 24 Cal. 540.)

It is urged by petitioner that if we apply this principle and regard the whole of the act and the evident purpose of the legislature, keeping in mind that an attempt to observe the requirement of the constitution must be presumed, we should read the clause as follows: "No child not born in this state whose parent or parents have not become citizens of this state or whose parent or parents have not resided here for three years shall be deemed a minor orphan," etc. As thus construed the law would it is claimed be reasonable and just and not obnoxious to said constitutional provision.

But we do not deem it necessary to decide whether this construction is permissible.

We are satisfied that respondent's position cannot be maintained and that one of the three following theories must be adopted, to wit: That the clause should be construed as advocated by petitioner, or that it should be held void and the remainder of the act upheld, or if that be not possible, then the act in force prior to and at the time of the enactment of the said amendment should be considered as still operative. Upon any of these theories petitioner is entitled to prevail.

We think the peremptory writ should issue and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

25 Cal. App.—35

[Civ. No. 1865. First Appellate District.—September 28, 1914.]

CREDIT CLEARANCE BUREAU (a Corporation), Respondent, v. **GEORGE A. HOCHBANN CONTRACTING COMPANY** (a Corporation), et al., Appellants.

CONTRACT—WRITTEN AGREEMENT OF SUBCONTRACTOR—SUBSTITUTION OF ORAL ONE.—Where a subcontractor doing plastering under a written contract threatens to abandon the work, claiming that the situation was misrepresented to him, in consequence of which he has undertaken the work at too low a price, and as a result of the differences thus arising he and the construction company enter into an oral agreement whereby he is to continue the work as superintendent and be paid the actual cost of the labor and materials, and the contract is "to be turned into a day's work job," the oral agreement is not a modification of the prior written contract, within the rule of section 1698 of the Civil Code that a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.

19.—CONSIDERATION—SETTLEMENT OF DISPUTE BETWEEN PARTIES.—Such oral agreement, being based "on the existence and settlement of disputes between the parties," is not invalid for want of consideration.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

H. M. Anthony, for Appellants.

Edwin H. Williams, and L. S. Melsted, for Respondent.

KERRIGAN, J.—This is an appeal from the judgment and from an order denying defendants' motion for a new trial.

The facts of this case are simple, and the questions of law are not difficult of solution. George A. Hochbann Contracting Company had a general contract for the construction of a certain building in San Francisco. This company entered into a sub-contract in writing with G. W. Burke, the assignor of the plaintiff, under the terms of which Burke was to do the plastering work on the building. The points in the case involve the questions: 1. Whether or not the work on the sub-

contract was done under the written contract or under an alleged oral contract; and, 2. If under the oral contract, whether or not that contract was void for lack of consideration.

As to the first of these contentions, it is sufficient to say that we have carefully read the record, and find ample evidence to sustain the finding that the work was done under an oral contract. As to the second point, we find no force in defendants' position that the oral contract, which was substituted for the former written contract, was without consideration, and hence void. It appears, according to the evidence introduced by the plaintiff, that Burke was proceeding very slowly with the work agreed to be done by him in the written agreement, and threatened to abandon the contract, claiming that the work had been misrepresented to him, in consequence of which he had undertaken the contract at too low a price. As a result of these differences Burke and the Construction Company ultimately entered into an oral agreement, whereby Burke was to continue the work as superintendent thereof, and the defendants were to pay him the actual cost of the labor and materials used therein, "and the contract was to be turned into a day's work job." The court having found, as it did, that the oral agreement was substituted in the place and stead of the old agreement, and that the latter was canceled, the oral agreement is not to be held to be a modification of the prior written agreement, and therefore ineffectual for that purpose under the terms of section 1698 of the Civil Code. (*Pearsall v. Henry*, 153 Cal. 314, 325, [95 Pac. 154, 159].)

Nor was the oral agreement void for lack of consideration, it being based, as disclosed by the evidence, "on the existence and settlement of disputes between the parties." (*Pearsall v. Henry*, 153 Cal. 314, [95 Pac. 154].)

The court found on all the material allegations framed by the pleadings.

The judgment and order appealed from are affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 27, 1914.

[Civ. No. 1371. First Appellate District.—September 30, 1914.]

WILLIAM WESTOVER et al., Appellants, v. H. V. BRIDGFORD et al., Respondents.

VENUE—MOTION TO CHANGE TO COUNTY WHERE DEFENDANTS RESIDE—

NOTICE OF MOTION—CURE OF DEFECTS.—Where the notice of a motion to change the venue of an action to the county where the defendants reside is defective in stating the grounds of the motion, the defect is cured if the notice concludes with the statement that the motion will also be based on the demand and affidavit of merits, which documents show in full the moving ground.

ID.—WAIVER OF DEFECTIVE NOTICE—APPEARANCE OF PLAINTIFF.—But if the defect were not cured, the plaintiff, by appearing and contesting the motion without raising objection, will be deemed to have waived the defect.

ID.—AFFIDAVIT OF MERITS—SUFFICIENCY.—An affidavit of merits on motion for a change of venue, which avers the facts of the case and leaves the question of whether or not the defendants have a meritorious defense based thereon to the consideration of the court, is sufficient.

ID.—VENUE AND JURAT OF AFFIDAVIT—VARIANCE—PRESUMPTION.—

Where an affidavit of merits has its venue laid in Siskiyou County and is sworn to before a notary public in the city and county of San Francisco, it will be presumed that the officer complied with the law and administered the oath within his jurisdiction.

ID.—CAPTION AND JURAT OF AFFIDAVIT—VARIANCE—PRESUMPTION.—

Where there is a variance between the caption and jurat of an affidavit, it will be presumed that the officer acted within his jurisdiction.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a change of venue.
J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Walter G. Holmes, and John J. Roche, for Appellants.

E. A. Bridgford, for Respondents.

KERRIGAN, J.—This is an appeal by plaintiff from an order granting the motion of certain of the defendants for a change of the place of trial.

The action is one in claim and delivery; and at the time it was commenced in the superior court in the city and county of San Francisco, several of the defendants resided in the county of Siskiyou, and others of them resided without the confines of the state of California. The defendants residing in the county of Siskiyou filed a demurrer to the complaint, accompanying it with an affidavit of merits, and the demand required by section 396 of the Code of Civil Procedure, and gave notice of their intention to move for a change of the place of trial to the county where they resided. The motion was granted. Plaintiff makes four points for a reversal of the order granting the motion. We will take these up in the order made.

The notice of motion was based upon the ground that none of the defendants at the time of the filing of the complaint or since were residents of the city and county of San Francisco. Section 395 of the Code of Civil Procedure provides that an action like the present one must be tried in the county in which the defendants or some of them reside at the commencement of the action . . . and if none of the defendants reside in the state . . . that the same may be tried in any county which the plaintiff may designate in his complaint. Plaintiff claims that in order to entitle the defendants to a change of venue, under the provisions of that section of the code, they should have stated in their notice the particular provision on which they relied as the ground of their motion (*Bohn v. Bohn*, 164 Cal. 532, [129 Pac. 981]); that the notice given being based on the ground that none of the defendants resided in the city and county of San Francisco is consistent with the fact that they all reside out of the state, in which event, under the terms of section 396, the action might be tried in any county the plaintiff should designate in its complaint. Conceding, for the sake of argument only, this point to be well taken, we think the defect is cured by the fact that the notice concludes with the statement that the motion will also be based on the demand and affidavit of merits, which documents show in full the ground upon which the motion will be made; namely, that the moving defendants reside in Siskiyou County. The notice is no more defective than if it had stated that the "Motion would be based on the grounds specified in the demand and the affidavit which are served and filed herewith." In such case it seems clear that the notice would be sufficient. Certain

it is that the papers served and filed in the proceeding afforded the plaintiff ample notice of the ground of the motion. But even if this were not so, the plaintiff, having appeared and contested the motion without raising this objection, must be deemed to have waived the claimed defect in the notice. (*Bohn v. Bohn*, 164 Cal. 532-538, [129 Pac. 981].)

The original affidavit of merits was defective in that it averred that the defendants had fully and fairly stated the matters of defense to the cause of action alleged by plaintiffs to their attorney, and that said attorney had advised them that they had a good and legal defense on the merits to the cause of action set forth in the complaint. (*Nickerson v. California Raisin Co.*, 61 Cal. 268; *Palmer & Ray v. Barclay*, 92 Cal. 199, [28 Pac. 226].) While the amended affidavit which was filed repeats the language of the original affidavit just referred to, nevertheless it is not, we think subject to the objection that it does not appear therefrom that they are advised by their counsel that they have a meritorious defense based upon his knowledge of all the facts of the case. In one part of the amended affidavit, it is averred that the attorney for the moving defendants took part as their legal advisor in all the transactions between the parties to this suit, concerning the subject matter thereof, and that his advice in this matter was based upon that knowledge. This, perhaps, is equivalent to saying that the defendants had stated the facts of the case to their counsel; but in addition to this, the affidavit also sets forth the facts of the case in detail, from which it is plain that, if the facts are true as averred, the defendants have a meritorious defense on the facts to plaintiffs' alleged cause of action. In other words, to repeat, defendants have averred the facts of the case, and left the question of whether or not they have a meritorious defense based thereon to the consideration of the court.

The venue of the amended affidavit of merits was laid in Siskiyou County, while it was sworn to before a notary public in the city and county of San Francisco. It is doubtless true that a notary is only authorized and empowered to administer oaths in the county for which he was appointed (*Fairbanks, Morse & Co. v. Getchell*, 13 Cal. App. 458, [110 Pac. 331]); but we will presume, there being no showing to the contrary, that the officer complied with the law and administered the oath within his jurisdiction. Where there is a variance be-

tween the caption and the *jurat* of an affidavit, it will be presumed that the officer acted within his jurisdiction (2 Cyc. 30; *Teutonia Loan & Building Co. v. Turrell*, 19 Ind. App. 469, [49 N. E. 852, 65 Am. St. Rep., 419]; *Goodnow v. Litchfield*, 67 Iowa 691, [25 N. W. 882]; *Goodnow v. Oakley*, 68 Iowa 25, [25 N. W. 912].) Moreover, it appearing that there was no objection to the affidavit in the trial court, the defect therein must be deemed waived. By sufficient averments, the affidavits show that the moving defendants reside in the county of Siskiyou, and that the other defendants reside in British Columbia, in other words, that none of the defendants reside in the city and county of San Francisco, and therefore, under the provisions of section 395 of the Code of Civil Procedure, the defendants are entitled to have the case tried in Siskiyou County.

The order appealed from is affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 27, 1914.

[Crim. No. 278. Third Appellate District.—September 30, 1914.]

**In the Matter of the Application of REAN M. SHOEMAKER
for a Writ of Habeas Corpus.**

EXTRADITION—SUFFICIENCY OF PAPERS—POWER OF COURTS TO GO BEYOND EXECUTIVE WARRANT AND DETERMINE.—Upon the application of a person held for extradition as a fugitive from justice to be discharged on *habeas corpus*, the court is empowered to go beyond the executive warrant and examine and determine the question of the sufficiency of the papers upon which the executive has acted in complying with the demand of the demanding state.

ID.—DECISION OF GOVERNOR ONLY PRIMA FACIE CORRECT.—The decision of the governor makes only a *prima facie* case, and it is competent for a court on *habeas corpus* to inquire into the correctness of his decision and discharge the prisoner.

ID.—EVIDENCE ON WHICH FUGITIVE IS HELD—RIGHT OF COURTS TO REVIEW.—Where the evidence adduced before the governor upon the

question whether the prisoner whose extradition is sought is a fugitive from justice of the demanding state is in substantial conflict, the finding of the executive that he is such fugitive will not be set aside by the courts, but such question of fact is a subject which may be reviewed by the courts, and upon which the prisoner may be discharged from custody, if it is made to appear that he was not within the borders of the demanding state at practically the precise time at which the alleged crime upon which he is proposed to be extradited was committed.

ID.—PREREQUISITES TO EXTRADITION OF FUGITIVE—SHOWING NECESSARY TO BE MADE BY DEMANDING STATE.—It must appear to the governor of a state to whom a demand in extradition proceedings is presented, before he can lawfully comply with it: 1. That the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled by an indictment or an affidavit certified or authenticated by the governor of the state making the demand; and 2. That the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand.

ID.—QUESTIONS OF LAW AND OF FACT REVIEWABLE ON HABEAS CORPUS.—The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*; the second prerequisite involves a question of fact whether the decision of the governor that the prisoner is a fugitive from the justice of the demanding state is well founded or justified, and it also is subject to judicial review on *habeas corpus*.

ID.—JUDICIAL REVIEW OF ACTION OF EXECUTIVE—SUFFICIENCY OF EVIDENCE—DISCHARGE OF PRISONER.—As the executive, before he can authorize the extradition of a resident of his state to another for trial on a criminal charge, must be shown by competent proof that the person whose extradition is sought is a fugitive from the justice of the demanding state, it is within the legal competence of courts to review the action of the executive in that respect, and to discharge the prisoner if it is found that the exercise of the executive authority, so far as that fact is concerned, was predicated upon insufficient proof, or in the presence of evidence offered by the prisoner sufficient to destroy the force of the *prima facie* showing by the state upon that point.

ID.—PRESENCE OF ACCUSED WITHIN DEMANDING STATE AT TIME OF CRIME—REVIEW OF QUESTION.—The right to review on *habeas corpus* the question whether or not the petitioner was in the demanding state when the crime for which his extradition is requested was committed, is not precluded on the ground that it involves the question of his guilt or innocence of the crime, as attempting to set up an *alibi*, for the question presented is not whether the petitioner was present at the scene of the alleged crime when it was committed,

but whether he was within the borders of the demanding state on that day, and if it is not thus shown, he is entitled to his discharge.

ID.—JURISDICTIONAL FACT—PRESENCE OF PRISONER WHEN CRIME COMMITTED.—Before a warrant of extradition can be sustained, it must appear as a jurisdictional fact that the prisoner is a fugitive from justice; that is, it must be shown that he was actually present in the demanding state when the crime was committed. Mere constructive presence is not enough.

ID.—INDICTMENT ACCOMPANYING DEMAND FOR FUGITIVE—ALLEGATION AS TO DATE OF CRIME—ABSENCE OF ACCUSED AT TIME ALLEGED.—Where an indictment accompanying a demand for extradition charges the commission of a crime without qualification and unequivocally on a certain date, and by neither specific nor general language pretends to fix or allege any other date, it must clearly appear by competent proof, direct or circumstantial, that the accused was in the demanding state on that day, and if it is not thus shown, he is entitled to be discharged.

ID.—FLIGHT OF ACCUSED—INDICTMENT AS EVIDENCE.—An indictment charging a person with the commission of a certain crime in the demanding state, constitutes, if any at all, very remote evidence of flight or of the fact that the accused is a fugitive from justice.

ID.—PRESENCE OF ACCUSED IN DEMANDING STATE AT TIME OF CRIME—PROOF CONCERNING.—If in support of the application for a warrant of extradition, the only affidavits presented are those which aver the presence of the accused in the demanding state eighteen days prior and three weeks subsequent to the date alleged in the indictment, such showing falls short of satisfactorily establishing that he is a fugitive from justice; but if it is conceded that such affidavits, together with the conclusion stated in the affidavit of the state's attorney that the accused "is a fugitive from justice," are sufficient to make out a *prima facie* case, yet the same can be overcome by a slight adversary showing, and is overcome by affidavits on behalf of the accused establishing that he was not in the demanding state at any time within two weeks of the alleged date of the crime.

ID.—DATE OF CRIME—NECESSITY OF SHOWING OR ESTABLISHING EXACT TIME.—There is no analogy between the general proposition that upon the trial of one charged with crime it is not required that the people shall prove, in order to sustain a conviction, that the crime was committed at the precise date specified in the indictment, and the proposition involved here, where, to constitute a person a fugitive from justice, it is indispensably necessary to show that the person whose extradition is sought was in the demanding state at the exact time of the commission of the offense with which he is charged.

ID.—HABEAS CORPUS—REHEARING—POWER TO GRANT.—After judgment in *habeas corpus* proceedings, either remanding or discharging the

petitioner, the district court of appeal has no power to grant a rehearing; and it is immaterial that he may be allowed to give bail for his appearance pending the hearing of his application.

Id.—**FINALITY OF JUDGMENT IN HABEAS CORPUS.**—A proceeding in *habeas corpus* is finally and definitely ended by judgment.

APPLICATION for a Writ of Habeas Corpus.

The facts are stated in the opinion of the court.

C. E. McLaughlin, and Beverly L. Hodghead, for Petitioner.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—The petitioner is held in custody and restrained of his liberty, at the city of Sacramento, by one Charles H. Harrington, agent of the state of Illinois, under the alleged authority of an executive warrant issued by the governor of the state of California on a requisition from the governor of said state of Illinois, authorizing the removal of the petitioner to the latter state to answer to an alleged indictment purporting to charge him with the crimes of conspiracy, larceny, and receiving stolen goods, alleged to have been committed in the city of Chicago, said state of Illinois, on the eighth day of June, 1912.

It is claimed that the petitioner is so restrained of his liberty illegally, and his release from such restraint is asked through this proceeding on *habeas corpus* on the following grounds:

First: That the alleged indictment accompanying the demand of the Illinois executive for his extradition is void:

Second: That it is clearly made to appear that, at the time at which the crimes charged in the indictment are alleged to have been committed, the petitioner was not within the borders of the state of Illinois, and that he is not, therefore, a fugitive from justice.

Our conclusion is that the petitioner must be ordered discharged from his present restraint on the ground that the record before us clearly discloses that he was not in the state of Illinois at the time of the alleged commission of the crimes charged in the indictment. It will, therefore, be unnecessary to consider the point involving the challenge of the sufficiency of the indictment.

The source of the power of interstate extradition is to be found in article IV section 2 of the constitution of the United States, which reads: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime."

For the proper execution of said provision, Congress passed an act, providing: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from which the person so charged has fled, it shall be the duty of the chief executive of the state or territory to which such person has fled to cause him to be arrested and secured and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive and to cause the fugitive to be delivered to said agent when he shall appear. If no such agent appears within six months from the time of the arrest the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing or transmitting of such fugitive to the state or territory making said demand shall be paid by such state or territory." (U. S. Rev. Stats., sec. 5278, [U. S. Comp. Stats. 1901, p. 3597, U. S. Comp. Stats. 1913, p. 10126, 3 Fed. Stats. Ann. p. 78].)

No question is raised here of the right of the courts, in a *habeas corpus* proceeding, to go beyond the executive warrant in a case of this character and examine and determine the question of the sufficiency of the papers upon which the executive has acted in complying with the demand of the demanding state or territory. That the courts may make full inquiry into such proceedings for the purpose of ascertaining and determining whether the executive warrant has, without legal justification, been issued, is firmly settled by a long line of decisions. For instance, in the case of *Jones v. Leonard*, 50 Iowa 110, [32 Am. Rep. 116,] it is said: "The governor of

this state is not clothed with judicial powers and there is no provision of the constitution or of the laws of the United States, or of this state, which provides that his determination is final and conclusive in the case of the extradition of a citizen. In the absence of such provision, we hold that the decision of the governor only makes a *prima facie* case; that it is competent for the court in a proceeding of this character to inquire into the correctness of his decision and discharge the prisoner." (See, also, *In re Terrell*, (Circuit Court,) 51 Fed. 213; *In re Corning*, (District Court) 51 Fed. 205; *People v. Brady*, 56 N. Y. 182; Church on *Habeas Corpus*, pp. 821-869; *Ex parte Tod*, 12 S. D. 386, 76 Am. St. Rep. 616, 47 L. R. A. 566, 81 N. W. 637; *In re Cook*, 49 Fed. 839; *Ex parte Hart*, 63 Fed. 249, [28 L. R. A. 801, 11 C. C. A. 165]; *In re Mohr*, 73 Ala. 503, [49 Am. Rep. 63]; *Hartman v. Aveline*, 63 Ind. 353, [30 Am. Rep. 217]; *People v. Hyatt*, 172 N. Y. 176, [64 N. E. 825, 60 L. R. A. 774, 92 Am. St. Rep. 706]; *People v. Donohue*, 84 N. Y. 438; *Hyatt v. New York ex rel. Corkran*, 188 U. S. 691, [47 L. Ed. 657, 23 Sup. Ct. Rep. 456]; *In re Waterman*, 29 Nev. 288, [13 Ann. Cas. 926, 11 L. R. A. (N. S.) 424, 89 Pac. 291].)

While some of the cases hold (and we think properly) that, where the evidence adduced before the governor upon the question whether the prisoner whose extradition is sought is a fugitive from justice of the demanding state is in substantial conflict, the finding of the executive that he is such fugitive will not be set aside by the courts, nevertheless no doubt has ever been entertained that such question of fact is a subject which may be reviewed by the courts and upon which the prisoner may be discharged from custody if it be made to appear that he was not within the borders of the demanding state at practically the precise time at which the alleged crime upon which he is proposed to be extradited was committed. This proposition necessarily follows from the essential conditions upon which alone the executive of one state is authorized to comply with the request of the executive of another state or territory that a citizen or resident of the former state be surrendered to the jurisdiction of the latter, there to undergo trial for a public offense against the laws of the demanding state. As is said by the supreme court of the United States, in the case of *Roberts v. Reilly*, 116 U. S. 80, [29 L. Ed. 544, 6 Sup. Ct. Rep. 291], in considering the question of the right of the governor

to recognize and honor a requisition for the extradition of a resident of his state and to issue his warrant thereon: "It must appear to the governor of a state to whom such a demand is presented, before he can lawfully comply with it: 1 That the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled by an indictment or an affidavit certified or authenticated by the governor of the state making the demand; and, 2. That the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand. The first of these prerequisites is a question of law and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*." As to the second prerequisite, which involves a question of fact, the court deemed it unnecessary to go further than to say: "How far his (the executive's) decision may be reviewed judicially in proceedings on *habeas corpus*, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the executive of the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof."

It will be observed that in that case the court in effect holds that the judicial review of proof offered in rebuttal of the *prima facie* showing involved in the finding of the executive that the prisoner is a fugitive from the justice of the demanding state will be made and that if thereupon it is considered sufficient to overthrow the presumption arising from the decision of the governor that the prisoner is such fugitive, he will be discharged on *habeas corpus*. And we are unable to understand how the rule could be otherwise and be just. It is, indeed, a necessary corollary of the second prerequisite as stated in the above opinion and without the existence and showing of which the governor would be without legal authority to comply with the request of the demanding state for the removal of the alleged fugitive to the latter state. Indeed, if it is proper to review the action of the executive so far as is concerned the question of the sufficiency of the indictment

or affidavits to disclose that a crime has been committed, then there is no reason why it is not competent for the courts to review the question whether the decision of the governor that the prisoner is a fugitive from the justice of the demanding state is well founded or justified. The one prerequisite is as necessary and important as the other. The papers might clearly show that a crime had been committed—that is, they might, both in substance and form and with proper legal precision, state a public offense under the laws of the demanding state—and yet the evidence might be either clearly wanting in a showing that the prisoner was in the demanding state when the alleged crime was committed or affirmatively show beyond a reasonable doubt or even by a marked preponderance of the evidence that he was not in such state at that time. As we understand from counsel in this case, the governor of this state had some doubt as to whether both the propositions upon which the prisoner relies here for his release, said propositions having been urged before the executive, were or were not legally sound, but conceived that, since it is not strictly within the scope of the duties of the executive head of the government to judicially review and determine purely legal questions, it were better that the legal aspects of the proceedings here be remitted to the courts for their consideration and decision—a very proper view, we think; but, speaking generally, it is to be remarked that if the courts were confined in their review of the action of the governor in cases of this character to the consideration and determination alone of the question of the legal sufficiency in any respect of the papers—the indictment or affidavits—to state a public offense; if, in other words, the courts were to be concluded by the decision of the executive upon the question whether the prisoner was in fact a fugitive from the justice of the demanding state, it could easily be understood how a citizen or resident of one state could, without a satisfactory showing or upon virtually no showing at all that he had fled from the state requesting his removal thereto, be taken from his own state and transported to another, there to be subjected to a trial for a crime with which he had and could have had no connection whatsoever.

But it appears to be now quite generally conceded that, as the executive, before he can authorize the extradition of a resident of his state to another for trial on a criminal charge, must be shown by competent proof that the person whose ex-

tradition is sought is a fugitive from the justice of the demanding state, it is within the legal competence of the courts, to review the action of the executive in that respect and to discharge the prisoner if it be found and determined that the exercise of the executive authority so far as that fact is concerned, was predicated upon insufficient proof of said fact, or in the presence of evidence offered by the prisoner which should be held to be sufficient to destroy the force of the *prima facie* showing by the state upon that point.

In *Illinois ex rel. McNichols v. Pease*, 207 U. S. 100, [52 L. Ed. 121, 28 Sup. Ct. Rep. 58], Mr. Justice Harlan, voicing the views of the court, after declaring that a warrant of extradition in itself made out a *prima facie* case that the prisoner was a fugitive from justice of the demanding state and that the warrant could be reviewed on *habeas corpus*, said "One arrested and held as a fugitive from justice is entitled, of right, upon *habeas corpus*, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the constitution and laws of the United States, a fugitive from the justice of the demanding state, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant." (See *Ex Parte Reggel*. 114 U. S. 642, [29 L. Ed. 250, 5 Sup. Ct. Rep. 1148]; *Hyatt v. New York ex rel. Corkran*, 188 U. S. 691, [47 L. Ed. 657, 23 Sup. Ct. Rep. 456]; *In re Mohr*, 73 Ala. 503, [49 Am. Rep. 63]; *Katyuga v. Cosgrove*, 67 N. J. L. 213, 50 Atl. 679; *Dodge v. Ellis*, 195 U. S. 626, [49 L. Ed. 350, 25 Sup. Ct. Rep. 791]; *Hartman v. Aveline*, 63 Ind. 344, [30 Am. Rep. 217]; *Tennessee v. Jackson*, 36 Fed. 259, [1 L. R. A. 370]; *Wilcox v. Nolze*, 34 Ohio St., 520; *Ex parte Dennison*, 72 Neb. 703, [117 Am. St. Rep. 817, 101 N. W. 1045]; *Dennison v. Christian*, 196 U. S. 637, [49 L. Ed. 630, 25 Sup. Ct. Rep. 795]; *State v. Schlachter*, 21 S. D. 276, 111 N. W. 566; *Ex parte Knowles*, 16 Ky. Law Rep. 263; *Commonwealth v. Superintendent etc.*, 220 Pa. St. 401, [21 L. R. A. (N. S.) 939, 69 Atl. 916]; 19 Cyc. 88; Spear on Extradition, p. 306.) And it has been held that, although the evidence upon the question whether the prisoner was absent or present in the demanding state when the crime charged against him was committed is conflicting if, nevertheless, the court is convinced from the whole record that the fact that he is a fugitive from justice has not been satisfac-

torily shown, the prisoner will be discharged. (*People v. McLaughlin*, 145 App. Div. 513, [130 N. Y. Supp. 458, 464].)

There is no merit in the contention of the attorney-general in the case at bar that the question whether the petitioner was or was not in the state of Illinois when the crime for which his extradition is requested by the latter state was committed cannot be reviewed upon *habeas corpus* because it involves the question of his guilt or innocence of said crime—that is, that by this proceeding he thus attempts to set up an *alibi*, an element which goes directly to the question of his guilt or innocence. The question presented in this proceeding is not whether the petitioner was present at the scene of the alleged crime when it was committed, but whether he was within the borders of the demanding state at the time said crime was committed. Obviously, if he was not in said state at said time, he cannot be a fugitive from justice within the meaning of the constitution and laws of the United States authorizing the extradition of fugitives from justice (*Hyatt v. New York ex rel. Corkran*, 188 U. S. 691, [47 L. Ed. 657, 23 Sup. Ct. Rep. 456]), and, although the investigation of that question necessarily involves the question of *alibi*, in a proceeding of this character it is a question of overruling importance and is to be considered, as before suggested, not for the purpose or with the view of solving the question of the guilt or innocence of the accused, but solely to determine whether he may lawfully be removed to the demanding state, where, perchance (it may well be suggested), he might be deprived of the privilege or opportunity of establishing an *alibi*, which might, if proved, exonerate him from the charge, by reason of the fact that witnesses by whom he could show he was not in Illinois when the crime was committed were beyond the jurisdiction of the courts of that state.

Replying, however, to a similar contention urged in the case of the *People v. McLaughlin*, the supreme court of New York, upon the authority of a large array of cases therein cited, said: "In *habeas corpus* proceedings (*People, ex rel. Ryan v. Conlin*, [15 Misc. Rep. 303, 36 N. Y. Sup. 888]) the prisoner gave proof that he was not in the demanding state at the time of the commission of the crime. The court declared that, inasmuch as this proof went to establish an *alibi*, it was a matter of defense at the trial, and could not be considered on *habeas corpus* to review the warrant of extradition. The reason

given by that court for this conclusion was that it was settled that in proceedings to review a warrant of extradition the guilt or innocence of the prisoner could not be inquired into. (*Matter of Clark*, 9 Wend. (N. Y.) 212.) Therefore, it is argued, as an *alibi* is concerned with the question of guilt or innocence, it cannot be considered on *habeas corpus*. It seems to us that this reasoning is clearly unsound. An *alibi*, in its general features, consists of proof that the defendant was not at the scene of the crime at the time of its commission. Proof that the prisoner was not in the demanding state at the time of the commission of the crime is necessarily proof that he was not at the scene of the crime. But the question involved in extradition proceedings is not whether the defendant was at the scene of the crime at the time of its commission, but whether he was anywhere within the demanding state when the crime was committed. This latter question had nothing to do with guilt or innocence, but it has all to do with the question whether the prisoner had fled from the demanding state, and is, therefore, a fugitive from justice.

"In the *Matter of Clark*, [9 Wend. (N. Y.) 212], the presence of the prisoner in the demanding state when the crime was committed was not disputed, and hence the question of *alibi* was not involved. Before a warrant of extradition can be sustained, it must appear as a jurisdictional fact that the prisoner is a fugitive from justice; that is, it must be shown that he was actually present in the demanding state when the crime was committed. Mere constructive presence is not enough."

The proposition as thus stated is clearly expounded and approved by all the cases. Indeed, if the proposition were not sound the question whether a person is in fact a fugitive from justice, within the contemplation of the constitution and laws of the United States authorizing interstate extradition, could never be inquired into by the courts. But, as is well suggested by counsel for the petitioner, to sustain the point as urged by the attorney-general would necessitate the declaration and the conclusion that the many cases heretofore passing upon the question were erroneous in their reasoning and conclusion.

Thus we have stated some of the principles governing the exercise of the power of interstate extradition and by the light of which the facts must and will be considered.

The indictment, a copy of which is annexed to the petition for this writ, alleges that the petitioner committed the crimes therein charged against him on the eighth day of June, 1912, in the county of Cook, in the state of Illinois. In other words, that accusatory pleading, without qualification and unequivocally, fixes the eighth day of June, 1912, as the date of the commission of the crimes of which the petitioner is thus accused, and by neither specific nor general language pretends to fix or allege any other date. It follows that it must clearly appear by competent proof, either direct or circumstantial, the latter, equally with the former, sufficient in evidentiary force to produce conviction of the fact, that the petitioner was in the state of Illinois on the eighth day of June, 1912. If it be not thus satisfactorily shown that he was in said state on said day, then, obviously, one of the two essential prerequisites upon which alone the executive is empowered to issue his warrant of extradition and so authorize the removal of the petitioner to the state of Illinois is wanting or not shown to exist, and the prisoner would, therefore, be entitled to be released from a restraint which, if not intercepted, would ultimately lead to the unlawful removal of his person to another state.

First, it is to be remarked that, manifestly the indictment itself or the fact that thus the petitioner is charged with having committed certain crimes in the demanding state constitutes, if any at all, very remote evidence of flight or of the fact that the accused is a fugitive from justice. A person may be a principal in the commission of a crime and not be present at the scene thereof at the time of its commission. As a concrete example, one might plan the crime of murder in California, to be committed in the state of New York by his confederates, he remaining and being in the former state at the time of its commission. While he would be a principal in the commission of said crime and could be indicted in New York for it and the courts of that state have the power or legal right to try and punish him therefor, if ever he came within their jurisdiction, still he would not be a fugitive from justice under the federal constitutional provision and laws establishing the authority for interstate extradition.

Now, as to the proofs in this case: In support of the application for the warrant of extradition, the respondent presented to the executive a number of affidavits which declare that at some other time than the eighth day of June, 1912, the peti-

tioner was in the state of Illinois. The first of these affidavits was made by the state's attorney of Cook County, Illinois, and all that he therein declares is that the petitioner fled from said state on or about the twenty-eighth day of August, 1912. Another is by one Konekamp, who declares that the petitioner, with certain other persons, conspired with others to steal certain property from affiant, which said property was stolen, in pursuance of said conspiracy, "on or about" the eighth day of June, 1912. One Roderick deposes that he is personally well acquainted with the petitioner and that "he knows of his own personal knowledge that the said Rean M. Shoemaker was personally present in the city of Chicago, County of Cook, state of Illinois, in the months of May and June, 1912." The dates in those months when he declares he saw Shoemaker were the twenty-first day of May—18 days prior to the alleged date of the larceny—and the twenty-eighth day of June, 1912—twenty days after said date.

The affidavits thus referred to constituted all the evidence presented by the respondent to sustain his application for the warrant of extradition.

It will be noted that no pretense is made that any person saw the petitioner or had personal knowledge of his presence in the state of Illinois on the eighth day of June, 1912. So far as is concerned the showing made by the demanding state, the whereabouts of Shoemaker on the said eighth day of June were unknown.

It must be admitted that the presence of the petitioner in the state of Illinois eighteen days prior and his presence therein approximately three weeks subsequent to the day on which the larceny with which he is charged was committed, even assuming it to be true that he was there on those dates, constituted exceedingly slight and at best unsatisfactory circumstances by which the conclusion may be supported that he was in Illinois on the eighth day of June. Those circumstances cannot be said to go any further than to tend to show that he *might* have been in Illinois on the eighth day of June. But while this is true, they are at the same time perfectly consistent with the hypothesis that he was not present in said state on said day or the few days immediately preceding and succeeding that date.

Thus it must be seen that the probative facts upon which the extradition of the petitioner is requested fall very far short

of satisfactorily establishing the all-important ultimate fact that he is a fugitive from the justice of the state of Illinois.

But, while it may, for the sake of the argument, be conceded that the testimony thus presented, considered in connection with the conclusion stated in the affidavit of the state's attorney that the petitioner "is a fugitive from the justice" of the state of Illinois, is sufficient to make out a *prima facie* case on that score, it is quite obvious that but a slight adversary showing by the petitioner would suffice utterly to destroy whatever probative value it might possess, standing alone or unchallenged.

But the petitioner has made more than a slight showing in rebuttal. The testimony presented by him is direct and positive.

The affidavit of the petitioner's wife, Alice L. Shoemaker, declares that she and her husband resided in California from the month of September, 1902, to December 8, 1911, on which latter date they removed temporarily to the city of New York, where they resided until the twenty-second day of August, 1912. "On the latter date, in company with my husband and family, we left New York for San Francisco, where we arrived on the 28th day of August, 1912, and have been residing in California since the latter date. My husband, the said R. M. Shoemaker, was at home in New York on the 8th day of June, 1912, and was not in the state of Illinois between the 15th day of May, 1912, and the 23rd day of August of said year; that on the said 23rd day of August we passed through Chicago on the journey from New York to California, and transferred from the Pennsylvania Railway cars to the Chicago, Burlington and Quincy Railroad at the Union Station, in Chicago."

Fred O. Dille deposes that, from about the first day of April to the thirtieth day of June of the year 1912, he resided with his family in the city of Buffalo, state of New York, and was then in the employ of the Western Union Telegraph Company; that he was in Buffalo on the eighth day of June, 1912; that as such employee he was under the supervision of the petitioner, whose office was then in the city of New York. "I recall distinctly and so aver," continues Dille's affidavit, "that on the 8th day of June, 1912, about the hour of 11 o'clock A. M., while in the city of Buffalo, state of New York, I called by long distance telephone at Statler Hotel said R. M. Shoemaker at his office in the city of New York, state of New

York, in the usual way, by informing the long distance operator of the telephone line, then operating between said cities, that I desired to speak to said R. M. Shoemaker at his office, at No. 9 John Street, city of New York, giving the number of his telephone, and at the said time said R. M. Shoemaker answered said telephone from the said city of New York, and I conversed with him over the telephone at that time and on that date and hour. I am familiar with his voice, and for that reason and from the subject matter of the conversation I know that it was said Shoemaker who answered the 'phone and was talking to me on said occasion."

The petitioner, in his affidavit, after denying any complicity in or connection with or knowledge of the commission of the crimes charged against him in the indictment, states that he continuously resided in the state of California from the month of September, 1902, to the eighth day of December, 1911, when, with his family, he removed to the city of New York, to remain in said city temporarily; that he was in the city of Chicago, county of Cook, state of Illinois, about the middle of the month of May, 1912, remaining there for a period of two or three days, during which time he lived at the Great Northern Hotel, in said city; that he left Chicago not later than the twenty-first day of May, 1912, and returned to the city of New York, where he remained until the twenty-second day of August, 1912, on which day he left New York City with his family and returned by continuous trip to the state of California, where he arrived on the twenty-eighth day of August, 1912, and where he has ever since resided; that, on said journey from New York to San Francisco he passed through the city of Chicago on the twenty-third day of August, 1912, and left that city on the same day for Portland, Oregon, thence immediately to the city of San Francisco; that he was not in the state of Illinois on the eighth day of June, 1912, or at any time in the months of June or July of said year, or at any other time or times during said year, except in the months of May and August, as above stated.

From the foregoing, which constitutes a statement in substance of the proofs submitted by the petitioner, the conclusion is inevitable that the petitioner was not in the state of Illinois on the eighth day of June, 1912, or at any time within two weeks of that date. In this declaration we assume that the testimony presented by the petitioner is to be given full

credence, and why not, under the circumstances? As shown, the respondent nowhere declares or pretends to say that the petitioner was in said state on the day when the crimes are alleged to have been committed, and it follows, therefore, that there is no direct proof upon that question save that which comes from the petitioner. If the state had produced affidavits declaring in positive and unequivocal language that the petitioner was in Illinois on the said eighth day of June, a situation precluding a judicial review of the decision of the executive might then be presented, notwithstanding that the proofs presented before the governor were, as is true here, by affidavits. But the situation confronting us is such that either we must give full weight to the proofs adduced by the petitioner or hold that from such proofs, there being, practically, no showing by the respondent justifying a contrary view, there at least arises so grave a doubt of the presence of the petitioner within the boundaries of the state of Illinois on the date of the alleged commission of the crimes charged in the indictment as to generate and support the conviction that, to lend judicial sanction to his removal under such circumstances, would involve an unlawful and wrongful menace to and invasion of his inalienable constitutional rights.

It is true, as a general proposition, that upon the trial of one charged with crime it is not required that the people shall prove, in order to sustain a conviction, that such crime was committed at the precise date specified in the indictment. The general rule at the trial is that, although the crime may be alleged to have been committed on a specific date, proof that the crime was committed on some date within the period beyond which the prosecution of one charged with the crime would be barred by the statute of limitations, would be sufficient and a conviction upon such proof, so far as that fact was concerned, properly upheld. But there is no analogy between that proposition and the one here, where, to constitute him a fugitive from justice, it is indispensably necessary to show that the person whose extradition is sought was in the demanding state at the exact time of the commission of the offense with which he is here charged. As is said in the case of *Hyatt v. New York ex rel. Corkran*, 188 U. S. 691, [47 L. Ed. 657, 23 Sup. Ct. Rep. 456], "That the prosecution on the trial of such an indictment need not prove with exactness the commission of the crime at the very time alleged in

the indictment is immaterial. The indictments in this case named certain dates as the times when the crimes were committed, and where in a proceeding like this there is no proof, or offer of proof, to show that the crimes were in truth committed on some other day than those named in the indictments, and that the dates therein named were erroneously stated, it is sufficient for the party charged to show that he was not in the state at the times named in the indictments; and when those facts are proved so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments, the facts so proved are sufficient to show that the person was not in the state when the crimes were, if ever, committed. . . . It is difficult to see how a person can be said to have fled from the state in which he is charged to have committed some act amounting to a crime against that state, when in fact he was not within the state at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither a narrow, nor, as we think, an incorrect, interpretation of the statute. It has been in existence since 1793, and we have found no case decided by this court wherein it has been held that the statute covered a case where the party was not in the state at the time when the act is alleged to have been committed. We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of the state, one who had not been in the state at the time when, if ever, the offense was committed, and who had not, therefore, in fact, fled therefrom."

From the foregoing considerations, we are persuaded that it is our duty to discharge the prisoner from the custody of the agent of the state of Illinois and from the consequent restraint of his person, and it is so ordered.

Chipman, P. J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on October 22, 1914, and the following opinion then rendered thereon:

CHIPMAN, P. J.—In an opinion filed September 30, 1914, in the above-entitled cause, by Mr. Justice Hart, speaking for the court, the facts and the law were very fully gone into and the conclusion reached was that the prisoner should be discharged and it was so ordered. We are now asked to grant a rehearing upon the ground that "this case if permitted to stand under the present decision will be of far-reaching importance as a precedent throughout the states of the Union, and it is highly important that the greatest measure of opportunity of full discussion of every possible feature of the law should be granted." Some authorities not called to our attention at the argument of the case are cited in the petition, but we cannot see that they cast additional light upon the questions involved. However this may be, we should feel inclined, out of abundant caution, to grant the petition were there not an insuperable objection in view of the nature of the case and the decisions of the supreme court upon the question of a right to a rehearing.

In *Ex parte Robinson*, 71 Cal. 611, [12 Pac. 794], Robinson petitioned the supreme court for a writ of *habeas corpus* and, after due hearing, he was remanded by order of the court. He filed a petition for rehearing and, in refusing to consider his petition, the court made the following order: "The Court: Petition for rehearing denied. There is no practice here allowing petition for rehearing in cases of *habeas corpus*."

Ex parte Williams was a *habeas corpus* case decided by this court in July, 1906, and the petitioner was discharged. (7 Cal. Unrep. 301, [87 Pac. 565].) He applied to the supreme court for a hearing in that court, under the provisions of article VI, section 4 of the constitution. The petition was denied. "Per Curiam. The application for an order transferring the above-entitled cause from the district court of appeal to the supreme court for hearing and determination after judgment in said district court of appeal is denied; a majority of the justices of this court being of the opinion that the constitutional provision with reference to the transfer of cases from the district court of appeal to the supreme court has no application in matters of *habeas corpus*."

In *Ex parte Zany*, 164 Cal. 724, [130 Pac. 710], a petition was filed in this court for a writ of *habeas corpus* and denied. (20 Cal. App. 360, [129 Pac. 295].) Zany petitioned the supreme court to have the cause there heard as was done in

the Williams case. The court, speaking through Mr. Justice Angellotti, Justice Shaw alone dissenting, again held that "it had no power to transfer in *habeas corpus* proceedings." The question was fully examined, the provision of the constitution carefully analyzed and the reasons very clearly given for denying the right. It seems to us that the full force of the reasoning is equally applicable where a rehearing is sought in this court, after it has either remanded or discharged the petitioner.

The contention of the attorney-general is that since the decision of the supreme court in the Robinson case, the law has been changed so that the petitioner may be admitted to bail pending the hearing and hence, the question of his present liberty being no longer involved, he is deprived of no right if after the order of his discharge the court should retain the power and exercise it to the extent of ordering a rehearing on the application of the people.

Both the Williams case and the Zany case were decided since the law was so changed as to allow a petitioner to give bail for his appearance pending the hearing on his petition for the writ. The question is whether, under the provisions of the constitution creating the district court of appeal, its judgment in *habeas corpus* cases is to be regarded the same as its judgments in *mandamus*, *certiorari*, and prohibition, which latter, as has been held, do not become final until "the expiration of thirty days after the same shall have been pronounced." (*Noel v. Smith*, 2 Cal. App. 158, [83 Pac. 167].)

In *Dawson v. Superior Court*, 158 Cal. 73, [110 Pac. 479], it was held that in prohibition cases the judgment of a district court of appeal may be transferred to the supreme court for reconsideration and decision.

The constitution provides as follows: "The said courts (district courts of appeal) shall also have power to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*, . . . The supreme court shall have power to order any cause pending . . . before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within thirty days after such judgment shall have become final therein. The judgments of the district courts of appeal shall become final therein upon the

expiration of thirty days after the same shall have been pronounced." (Const., art. VI, sec. 4.)

The attorney-general contends that a judgment of the district court of appeal in a *habeas corpus* case, so far as concerns its finality, does not differ from a judgment in *mandamus* or prohibition. If it is final in the sense that judgments in prohibition and *mandamus* cases are final, it must follow that, as in these latter cases it may be reconsidered in this court before the expiration of thirty days from its rendition and by the supreme court before the expiration of sixty days, as are the other cases mentioned. But the supreme court, in the Zany case, distinctly held that the provision of the constitution declaring that "the judgments of the district courts of appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced," is not applicable to *habeas corpus* proceedings. Attention is invited to the full discussion of the question and the reasons given for its decision by the supreme court, which we do not deem it necessary to here repeat.

It will be observed that the supreme court says that "a *habeas corpus* proceeding cannot fairly be said to be so 'pending' at any time after judgment by such court. Such a proceeding is finally and definitely ended by the judgment, and if the petitioner be ordered discharged thereby, he is at once restored to liberty." If, then, our judgment, in this class of cases, remanding the petitioner is of such nature that he may at once have relief by an original petition to the supreme court for a writ without waiting the expiration of sixty days, we can see no reason why our judgment discharging the petitioner should in effect be suspended for thirty days with the right on the part of the respondent during that period to demand a rehearing in this court. The provision of the constitution under which this right is now claimed must be held to apply equally to a judgment of discharge as well as to a judgment remanding the petitioner. The very object of the constitution was to give opportunity to have the judgments of the district courts of appeal reconsidered by the supreme court. But as *habeas corpus* cases, as has been decided by the supreme court, are not of the class which may be thus reconsidered, it would seem to follow that a proceeding of this nature, as the supreme court has also decided, "is finally and

definitely ended by the judgment," whether it be a judgment denying or granting the writ.

We attach no special significance to the fact that the petitioner may now be allowed to give bail for his appearance pending the hearing of his application. The object of the writ is to test the legality of his restraint and until he is discharged he cannot be said to be at liberty, and when discharged we do not think there is any provision of law, and certainly no rule of practice whereby he may again be brought before the court and compelled to show cause why the order discharging him should not be vacated and his petition reheard. The object of the writ is not merely to relieve the petitioner from present physical restraint but from all restraint which is being imposed upon him by his illegal detention. (Church on *Habeas Corpus*, sec. 87.)

We have exercised the power to grant rehearings, in ordinary cases, upon petition filed within the thirty days mentioned in the constitution and would probably vacate a judgment upon our own motion within that time if we thought an error had been committed. But we have no such power under the constitution after our judgments have become final; the only source of relief then open to a party is by petition to the supreme court under the rules of that court. (Par. 3, rule xxx, [160 Cal. lvi, 119 Pac. xiv].) As we have seen, neither the provisions of the constitution nor the rules of the supreme court apply to *habeas corpus* cases. It hence follows that we cannot grant a rehearing in such cases.

The petition is denied.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1350. First Appellate District.—October 7, 1914.]

WILLIAM J. SHELLER, Appellant, v. S. LIVINGSTON and F. DEUTSCH (Partners Doing Business Under the Name and Style of Western Machinery Company), Respondents.

CLAIM AND DELIVERY—PARTNERSHIP PROPERTY—AWARD TO PARTNER ON DISSOLUTION—LIEN FOR STORAGE—SUFFICIENCY OF TENDER.—Where certain copartnership property was awarded by order of court to one of the partners in a dissolution suit, but, before the award, was delivered by the other partner to third persons for storage at an agreed price, and, on demand for delivery of the property by the partner to whom it had been awarded, the parties having possession of it asserted a claim of lien for storage charges and also for goods sold and delivered to the other partner, the fact that no actual production of the money was made, in an offer to pay the storage charges, does not render the tender ineffectual, where no objection was made on this ground in the rejection of the offer.

Id.—CONSTRUCTION OF SECTION 2074 CODE CIVIL PROCEDURE AND SECTION 1500 CIVIL CODE—EXTINGUISHMENT OF OBLIGATION—OFFER TO PAY. The contention that section 2074 of the Code of Civil Procedure and section 1500 of the Civil Code provide the method of procedure in such case is without merit. The former section does not prescribe the mode of tender, but rather a method of extinguishing an obligation when that object is sought; the latter section relates to an offer in writing to pay, and is a mere rule of evidence.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing a new trial. John J. Van Nostrand, Judge.

The facts are stated in the opinion of the court.

J. K. Johnson, for Appellant.

Lozis H. Brownstone, for Respondents.

RICHARDS, J.—This is an action for claim and delivery brought to recover the possession of a certain gas engine with appurtenances.

The property belonged to the plaintiff and one de Bretteville, as partners, doing business under the name and style of the American Sand Blast Company.

In an action for the dissolution of that copartnership, the property in question was awarded to the plaintiff herein by the court.

Prior thereto it had been delivered by de Bretteville to the defendants in this action, for storage at an agreed price of five dollars a month.

Defendants had sold and also rented certain goods to de Bretteville.

Subsequent to the award of the property to plaintiff in the action for the dissolution of the copartnership, and before the commencement of this action, a demand was made by plaintiff herein upon the defendants for its possession.

At the time the demand was made, one of the defendants asserted a claim of lien in the property for the storage charges and also for the goods sold and rented to de Bretteville.

Plaintiff offered to pay the amount of the storage charges, but refused to pay the amount claimed to be due for the goods so sold and rented.

Defendants refused to deliver up the machinery under this offer, whereupon plaintiff sued defendants in claim and delivery, and the defendants in their answer and by way of counterclaim and cross-complaint set up a lien for the storage and for the goods sold and rented to de Bretteville.

The court below found against the defendants on all the issues tendered by them except their claim of lien for storage and found in favor of the plaintiff on all of said issues, but found for the defendants on the issue of tender made by the plaintiff to the defendants of the amount of the storage charges.

Judgment was thereupon given for the defendants—plaintiff's motion for a new trial was denied and this appeal is taken from that order.

The only point therefore involved in this appeal is the question as to the sufficiency of the tender.

The evidence upon which the finding was based is brought up on a bill of exceptions.

The evidence is without conflict and shows that plaintiff and his counsel called upon defendants with the object in view of obtaining possession of the property and offered to pay the amount of the storage charges. One of the defendants whom they met stated to them that his firm claimed a lien on the property, not only for the storage charges, but also for goods

sold to de Bretteville, and stated that he desired to submit the matter to his attorney and would give an answer later. Subsequently plaintiff's attorney was advised by an agent of the defendants that he was instructed by defendants to inform plaintiff that they refused to deliver up the machinery under the proposal made by plaintiff and had decided to hold it for the full amount of their claim.

Plaintiff in offering to pay the storage charges made no actual production in money of the amount due and it is mainly for this reason that the sufficiency of the tender is questioned.

It appears, however, from the evidence that the offer was not accepted by defendants and no objection was made by him at the time that there was no actual production of the amount due as storage charges, nor does it appear that any demand was made that the money be produced. In the absence of such objection the tender was a valid one. (Civ. Code secs. 1496, 1501; *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, [70 Pac. 82].)

The further contention of defendants that section 2074 of the Code of Civil Procedure and section 1500 of the Civil Code provide the method of procedure to be followed in such a case is without merit.

Section 1500 of the Civil Code reads as follows:

"An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor."

This section does not prescribe the mode of tender, but rather a method of extinguishing an obligation when that object is sought. (*Sayward v. Houghton*, 119 Cal. 545, [51 Pac. 853, 52 Pac. 44].) Section 2074 of the Code of Civil Procedure relates to an offer in writing to pay, and is a mere rule of evidence. (*Colton v. Oakland Bank of Savings*, 137 Cal. 376, 383, [70 Pac. 225].)

For the reasons given the order denying plaintiff's motion for a new trial is reversed, and a new trial is granted.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1508. First Appellate District.—October 7, 1914.]

MELVILLE S. TOPLITZ et al., Appellants, v. STANDARD CO. (a Corporation), Respondent.

UNLAWFUL DETAINER—POSSESSORY ACTION—CANNOT BE DEFEATED BY FACT OF SECURITY GIVEN FOR RENT.—Unlawful detainer is primarily a possessory action, which cannot be defeated or delayed by the fact that the landlord has taken security for his rent, without destroying the manifest design of the legislature (Code Civ. Proc., sec. 1161) to provide a summary remedy for the recovery of the possession of the premises withheld by a tenant in violation of the covenants of a lease or other agreement.

Id.—DAMAGES RECOVERABLE INCIDENTALLY—ACTION NOT FOR RECOVERY OF MONEY—MORTGAGE TO SECURE RENT NO BAR.—Incidentally a judgment for the plaintiff in an action of unlawful detainer may award such actual damages as may have been occasioned by a withholding over after a breach of the covenants of the lease; and in addition may, if the circumstances of the case justify it, award to the plaintiff by way of punitive damages a sum equal to treble the amount of the rent then due; but in no sense is an action of unlawful detainer one for the recovery of a debt or the enforcement of a right secured by a mortgage given for security of the rent reserved in the lease under which the premises are held, and therefore the existence of such mortgage cannot be pleaded as a bar to the action, under the provisions of section 726 of the Code of Civil Procedure.

Id.—FINDING AS TO MORTGAGE IMMATERIAL—WHEN PLAINTIFFS ENTITLED TO JUDGMENT ON APPEAL.—In an action of unlawful detainer, where the trial court found, in substantial accord with the admitted allegations of the complaint, in favor of the plaintiffs in so far as concerned the execution of the lease and the breach of the covenant to pay the rent reserved, but further found that a mortgage given as security for the rent had not been resorted to and exhausted prior to the institution of the action, and from the latter finding deduced the conclusion of law "that by reason of the provisions of section 726 of the Code of Civil Procedure" the action is barred, the existence of the mortgage being no defense, the finding in relation thereto is immaterial, and the judgment should have been for plaintiffs, and will be so ordered on appeal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John J. Van Nostrand, Judge.

The facts are stated in the opinion of the court.

Stratton, Kaufman & Torchiana, for Appellants.

Leon Samuels, for Respondent.

LENNON, P. J.—This is an appeal upon the judgment-roll alone from a judgment entered in favor of the defendant in an action of unlawful detainer. All of the material allegations of the plaintiffs' complaint were admitted by the failure of the defendant's answer to deny them. The defendant, however, as a defense to the action pleaded the existence of a mortgage executed by the defendant to the plaintiffs as security for the rent reserved in the lease under which the defendant held and occupied the premises in controversy.

The court below, in substantial accord with the admitted allegations of the complaint, made its findings of fact in favor of the plaintiffs in so far as concerned the execution of the lease and the breach of the covenant to pay the rent reserved; but further found that a mortgage given as security for the payment of the rent had not been resorted to and exhausted by the plaintiffs prior to the institution of the present action; and from the latter finding deduced the conclusion of law "that by reason of the provisions of section 726 of the Code of Civil Procedure of the state of California the action is barred and cannot be maintained."

The code section referred to provides that "There can be but one action for the recovery of any debt, or for the enforcement of any right secured by mortgage upon real or personal property . . ." (Code Civ. Proc., sec. 726). The lower court's conclusion of law cannot be sustained. Unlawful detainer is primarily a possessory action, which cannot be defeated or delayed by the fact that the landlord has taken security for his rent, without destroying the manifest design of the legislature (Code Civ. Proc., sec. 1161) to provide a summary remedy for the recovery of the possession of the premises withheld by a tenant in violation of the covenants of a lease or other agreement. Incidentally a judgment for the plaintiff in an action of unlawful detainer may award such actual damages as may have been occasioned by a withholding over after a breach of the covenants of the lease; and in addition may, if the circumstances of the case justify it, award to the plaintiff by way of punitive damages a sum equal to treble the amount of the rent then due (Code Civ. Proc., sec. 1174); but in no sense is an

action of unlawful detainer one of debt. Consequently it cannot be said that the present action is one for the recovery of a debt or the enforcement of a right secured by the mortgage in controversy.

It follows that the defense interposed and relied upon was not as a matter of law available to the defendant. The finding with reference to the execution and existence of the mortgage was therefore immaterial, and may be disregarded. The defendant having admitted and the lower court having found the execution of the lease, and the failure of the defendant to pay the rent reserved therein after the statutory notice to pay or surrender possession of the leased premises, judgment should have been entered for the plaintiffs.

The judgment is reversed, with instructions to the lower court to render and enter judgment in favor of the plaintiffs upon and in keeping with the findings as made relating to the execution and breach of the lease.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 5, 1915.

[Civ. No. 1235. Third Appellate District.—October 7, 1914.]

JOHN E. BUCKLEY, Respondent, v. COUNTY OF MARIN,
Appellant.

NEW TRIAL—GENERAL ORDER GRANTING—INSUFFICIENCY OF EVIDENCE—DISCRETION OF COURT—REVIEW BY APPELLATE COURT.—When an order granting a new trial is general it is the well-settled rule that such order will not be reversed unless it appears that the order itself was an abuse of discretion. The granting or denying of a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon the appellate court, unless it appears that there has been an abuse of such discretion, and it is immaterial whether the evidence is insufficient to sustain all or only a portion of the issues on which the judgment depends.

CONTRACTS—CONSTRUCTION OF BRIDGE FOR COUNTY—PERFORMANCE—WHAT CONSTITUTES.—Under a contract for the construction of a bridge for a county, in order for the contractor to recover, either on the contract or on *quantum meruit* for the reasonable value of the work and material, he must show a substantial performance and that he attempted in good faith to perform the contract.

ID.—NEW TRIAL—ORDER GRANTING—SPECIAL VERDICT—MOTION FOR JUDGMENT ON—WHEN DISCRETION NOT ABUSED.—Where the jury, in an action to recover for such work, found, from conflicting evidence, upon special issues, that the contractor did not “honestly” nor “in good faith endeavor to comply with the terms and conditions of said contract,” and did not “complete said work substantially in accordance with the terms and conditions of said contract,” but that the reasonable value of the services performed and material furnished were three thousand dollars, for which sum it rendered a general verdict in favor of the plaintiff, it was not an abuse of discretion for the trial court to grant plaintiff’s motion for a new trial, and to deny defendant’s motion for judgment in its favor on the special findings.

ID.—ORDER DENYING MOTION FOR JUDGMENT ON SPECIAL FINDINGS—RULE IN REVIEWING.—In such a case, in denying defendant’s motion for judgment in its favor on the first special finding, the court had the power to exercise its own judgment as to the sufficiency of the evidence to support such finding, and there being a substantial conflict in the evidence addressed to the issues by that finding determined, the rule applicable to the motion for a new trial is equally applicable to defendant’s motion, and unless the appellate court can say that the trial court abused its discretion its action is conclusive on appeal.

APPEAL from an order of the Superior Court of Marin County granting a new trial and an order denying a motion for judgment on special finding. George H. Buck, Judge presiding.

The facts are stated in the opinion of the court.

Thos. P. Boyd, District Attorney, and W. B. Crocker, for Appellant.

Sullivan & Sullivan and Theo. J. Roche, for Respondent.

CHIPMAN, P. J.—This is an action commenced by plaintiff, as assignee of the Dundon Bridge and Construction Company, against the county of Marin, and arises out of a contract entered into between the said company and defendant

for the construction of a bridge across the tidal channel separating Belvedere from Tiburon in said county. Two causes of action are set forth in the complaint: 1. To recover the sum of seven thousand dollars, the contract price for the work described in the complaint. 2. To recover the reasonable value of the work done, not to exceed the sum of seven thousand dollars.

It is alleged in the first count of the complaint that plaintiff's assignor commenced the work on September 1, 1903, and prosecuted same "with due diligence, and thereafter duly performed said contract and all the terms and conditions thereof and fully completed the same on the 1st day of February, 1905." In the second count it is alleged that plaintiff's assignor, between the dates above named, performed certain labor and furnished certain materials in and about the construction of said bridge; "that said work in the performance of which said services were rendered and said materials furnished, was completed on the first day of February, 1905. That said defendant and the public generally are now, and ever since the completion of said bridge have been using and enjoying the same. That the reasonable value of said services so rendered and said materials so furnished, as aforesaid, was and is eleven thousand (\$11,000) dollars," and judgment is prayed for the sum of seven thousand dollars, the amount fixed by the contract.

Defendant, in its answer, sets up the defense of nonperformance of the contract and specifies numerous particulars in respect of which it is alleged that it has been breached; that the county surveyor has recommended that the work be not accepted and that the board of supervisors has never accepted said work as completed, nor has it accepted any part thereof. "Defendant denies that ever since the alleged completion of said bridge, or at any other time or at all, it has been using or enjoying the same. Defendant admits that the public generally are now and ever since the alleged completion of said bridge has been using said bridge, but denies that it has been enjoying the same." Denies that the reasonable value of the services rendered or materials furnished as alleged are of the value of seven thousand dollars or any other sum.

The trial was had before a jury and upon the submission of the case the court directed the jury to find upon the following special issues: "1. Did the Dundon Bridge and Construction

Company honestly and in good faith endeavor to comply with the terms and conditions of said contract entered into between itself and the defendant in this case; and did said company complete said work substantially in accordance with the terms and conditions of said contract? 2. What is the reasonable value to the defendant of the work performed and materials furnished by said Dundon Bridge and Construction Company in constructing said drawbridge, pile foundation, concrete walls, filling and sidewalks described in plaintiff's amended complaint?" To the first question the jury answered "No." To the second the response was "\$3,000.00." The jury also returned a general verdict as follows: "We the jury in the above entitled cause, find for the plaintiff in the sum of \$3,000."

In due time defendant moved the court to direct the clerk to enter judgment, in accordance with special finding No. 1, that plaintiff take nothing by his action and for defendant's costs of suit. Plaintiff also in due time moved the court for a new trial and both motions were heard by the court at the same time. The court denied defendant's motion and directed the clerk "to enter judgment *nunc pro tunc* in accordance with the verdict rendered herein" and thereupon granted plaintiff's motion for a new trial. Defendant appeals from the order denying its motion for judgment on the special finding and also from the order granting plaintiff's motion for a new trial.

When the order granting a new trial is general it is the well-settled rule that such order will not be reversed unless it appears that the order itself was an abuse of discretion. (*Von Schroeder v. Spreckels*, 147 Cal. 186, [81 Pac. 515]; *Estate of Evarts*, 163 Cal. 449, 452, [125 Pac. 1058].) In *Domico v. Cassassa*, 101 Cal. 412, 413, [35 Pac. 1024], the court said: "The granting or denying of a new trial on the ground that the evidence is insufficient to justify the verdict" (which was one of the plaintiff's grounds for his motion), "where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of such discretion; and it is immaterial whether the evidence is insufficient to sustain all or only a portion of the issues on which the judgment depends."

We do not deem it necessary to quote from the testimony of the witnesses relating to the numerous particulars in respect of which defendant claims that the evidence shows a failure on the contractor's part to perform the work in the manner called for by the contract. There is a substantial conflict in the evidence respecting the completion of the contract and there is a like conflict in the evidence concerning nearly every one of the alleged departures from or violations of the contract in the particulars pointed out by the defendant in its brief.

Defendant places its chief reliance upon what it claims to be the doctrine in this state: "That the owner is entitled to have built in all essential particulars the structure he contracted for, and no other; second, that where there has been departures from the plans in substantial particulars, the court can have no occasion to estimate the deficiencies, and the contractor cannot recover on a *quantum meruit*." In support of its contention defendant cites *Clark v. Collier*, 100 Cal. 256, [34 Pac. 677]; *Perry v. Quackenbush*, 105 Cal. 300, [38 Pac. 740]; *Golden Gate Lumber Co. v. Schwabacker*, 105 Cal. 117, [38 Pac. 635]; *Marchand v. Hayes*, 117 Cal. 669, [49 Pac. 840], and *Laidlaw v. Marye*, 133 Cal. 170, [65 Pac. 391].

Respondent relies upon the rule as found in 3 Page on Contracts, p. 1385: "The original common-law rule required a strict and literal performance as a condition precedent to recovery. The modern rule permits recovery without a strict and literal performance, if there has been a substantial performance, and the contractor has attempted in good faith to perform the contract. If a contract has been performed substantially, and deviations from the contract have been made but not willfully and in bad faith, the parties so performing can recover the contract price less the amount of damages caused by such deviation."

The rule is very clearly laid down and the cases examined in *Laidlaw v. Marye*, 133 Cal. 170, [65 Pac. 391]. In that case the controversy was between the assignee of the original contractor and the owner, in an action on the contract and also in *quantum meruit et valebat*, where the contract was "wholly void," under the provisions of section 1183 of the Code of Civil Procedure, because not recorded. It was held that there could be no recovery because it appeared that "the variance between the work called for and the work done was

substantial." (Citing *Perry v. Quackenbush*, 105 Cal. 300, [38 Pac. 740] and *Marchand v. Hayes*, 117 Cal. 669, [49 Pac. 840].)

The jury, as we have seen, found that the contractor did not "honestly" nor "in good faith endeavor to comply with the terms and conditions of said contract"; and did not "complete said work substantially in accordance with the terms and conditions of said contract." Had this finding of the jury rested upon uncontroverted evidence it would, in our opinion, have justified a judgment in defendant's favor, for all the cases enunciating the more modern rule require, as Mr. Page expresses it, that there should be "a substantial performance and that the contractor has attempted in good faith to perform the contract," precisely the thing which the jury found the contractor did not do in the present case. This finding, however, does not rest upon uncontroverted evidence, and the rule first above adverted to applies equally to "all or only a portion of the issues on which the judgment depends." (*Domico v. Cassassa*, 101 Cal. 412, [35 Pac. 1024].) There was a substantial conflict upon most of the issues presented in the case and we cannot say that the court abused its discretion in reaching the conclusion that there should be a new trial.

In denying defendant's motion for judgment in its favor on the first special finding, the court had the power to exercise its own judgment as to the sufficiency of the evidence to support such finding, and there being a substantial conflict in the evidence addressed to the issues by that finding determined, the rule applicable to the motion for a new trial is equally applicable to defendant's motion, and unless we can say that the court abused its discretion its action is conclusive upon this court. We cannot so say.

The orders are affirmed.

Hart, J., and Burnett, J., concurred.

[Crim. No. 266. Third Appellate District.—October 7, 1914.]

THE PEOPLE, Respondent, v. JOSEPHINE HORN,
Appellant.

CRIMINAL LAW—CHARGE OF STATUTORY RAPE—CONVICTION OF ATTEMPT TO COMMIT—SUFFICIENCY OF EVIDENCE.—In this prosecution for statutory rape, alleged to have been committed upon a child of eleven years of age by one who was aided and abetted by defendant, it is held that the evidence was sufficient to sustain a verdict finding the defendant guilty of an attempt to commit the crime charged.

ID.—EVIDENCE—TESTIMONY OF PROSECUTRIX AND YOUNG BROTHER—DISCREPANCIES IN—CREDIBILITY OF FOR JURY TO DETERMINE.—In such a case, although the testimony of the prosecutrix and her brother (who was younger than she), contained some discrepancies, it was a matter entirely within the legal competency of the jury to determine whether, notwithstanding such discrepancies, the testimony of those witnesses was, in the main, entitled to credit and sufficient to generate a conviction, beyond a reasonable doubt, of the guilt of the defendant.

ID.—TIME OF COMMISSION OF CRIME—PLEADING AND PROOF—VARIANCE—WHEN IMMATERIAL.—In such a case, it was proper to allow evidence disclosing that the crime was committed on another day than that fixed in the information, where only one act of intercourse was claimed to have been committed in the case.

ID.—EVIDENCE—DIFFERENT ACTS OF SEXUAL INTERCOURSE—WHEN PEOPLE SHOULD ELECT.—While the prosecution on a charge of rape may show that the crime described in the information was committed on some other day than that specially named or the day in near proximity to which the criminal act occurred, where it is claimed that several different felonious acts of sexual intercourse have taken place on as many different days between the defendant and the prosecutrix, it is the duty of the people, in the prosecution of the defendant, to select some particular time at which such act was committed and address their proof to the establishment of the crime at such time.

ID.—INSTRUCTIONS—SUFFICIENCY OF ENTIRE CHARGE.—It is held in this prosecution for rape that from an examination of the entire charge it appears that the jury were fully and correctly instructed upon all the principles of the law pertinent to the charge set forth in the information.

ID.—LACK OF COMPLAINT OF ASSAULT BY PROSECUTRIX—INSTRUCTION AS TO PROPERLY REFUSED.—In a prosecution for rape it was proper for the court to reject an instruction offered, by the defendant, which, if given, would have impressed upon the jury the importance

of the absence of proof that the prosecutrix made complaint of the assault immediately after it occurred, as such an instruction would tend to create the impression that a conviction of the crime of rape could not be legally justified where there was no proof of immediate discovery to some third party by the prosecutrix of the fact of the assault upon her person, which is not required by the law.

ID.—EVIDENCE—CORROBORATION OF PROSECUTRIX UNNECESSARY—IMMEDIATE COMPLAINT OF ASSAULT ADMISSIBLE AS CORROBORATION.—The fact that the prosecutrix in a case of rape made complaint of the assault to a third person immediately after it took place may be shown for the purpose only of corroborating her testimony of the assault; the allowance of such testimony for that purpose is an exception to the general rule against the proof of self-serving declaration, but, although such proof is allowable as corroboration, the law does not require the prosecutrix to be corroborated in order to sustain a conviction.

ID.—INSTRUCTIONS—REFUSING TO CALL JURY'S ATTENTION TO PARTICULAR EVIDENCE PROPER—EXAMINATION OF PROSECUTRIX BY DOCTORS.—There was no error in such a case in refusing to charge the jury, at defendant's request, in substance, that it was the jury's duty to consider, in connection with the absence of proof that the prosecutrix complained to others of her treatment by the defendant immediately following the assault, the testimony of the doctors who professionally examined the sexual organs of the prosecutrix for the purpose of determining whether there existed therein conditions indicating that she had been subjected to acts of sexual intercourse, where the court instructed the jury that it was their duty to consider all the admitted evidence and to be governed entirely by that evidence in solving the question of the defendant's guilt or innocence. Such an instruction is also open to the objection that it calls the jury's attention to particular evidence or the want of evidence on some particular point, which is a practice not commendable.

ID.—INSTRUCTION TO SCAN TESTIMONY OF PROSECUTRIX FOR DESIGN PROPERLY REFUSED.—In such a case, there was no error in refusing an instruction offered by defendant which was not only argumentative but would have instructed the jury that it was their duty to "scan the testimony of the prosecuting witness carefully to ascertain if she would be likely to have a design to warp her testimony to the prejudice of the defendant," and that they were at liberty to disregard her testimony, where the court fully, clearly, and correctly instructed the jury upon the general subject as to their duty and right in the matter of disposing of the testimony of the prosecutrix.

ID.—ARGUMENTATIVE INSTRUCTIONS IMPROPER.—Argumentative instructions to a jury are not permissible and should never be given.

ID.—INSTRUCTIONS—WHEN CONVICTION OF ATTEMPT ALLOWABLE.—In a prosecution for rape, there was no error in giving an instruction

to the effect that, under the evidence, the jury were authorized to find the defendant guilty of an attempt to commit rape, where there was evidence from which the jury could have concluded that, rather than the crime itself, the accused had been guilty of an attempt to commit it.

ID.—CONVICTION OF ATTEMPT—CONSTRUCTION OF SECTION 663 PENAL CODE.—Under section 663 of the Penal Code, a person prosecuted for an attempt to commit a crime, may be convicted thereof, although the evidence may show that the crime intended or attempted was perpetrated by the accused in pursuance of such attempt, "unless the court, in its discretion, discharges the jury and directs such person to be tried" for the crime itself; and there is no sound reason for holding that the principle stated in this section should not be as applicable to a case where the charge is of the crime itself and a conviction of an attempt to commit it sustainable.

ID.—MOTION FOR NEW TRIAL—MISCONDUCT OF JUROR—CONFLICTING EVIDENCE—FINDING CONCLUSIVE ON APPEAL.—In a prosecution for rape, where the evidence is conflicting on a charge made on a motion for a new trial, that one of the jurors, while the trial was in progress, during adjournments, had referred to the case in conversation with a certain person and on another occasion discussed with or expressed to another party his conception of the merits of the case and declared his intention of voting for a verdict of conviction, a finding of the trial court in favor of the people upon the question is binding upon the court on appeal.

APPEAL from a judgment of the Superior Court of Humboldt County and from an order refusing a new trial. George D. Murray, Judge.

The facts are stated in the opinion of the court.

H. M. Frost, for Appellant.

U. S. Webb, Attorney-General, and **J. Charles Jones**, Deputy Attorney-General, for Respondent.

HART, J.—The defendant was charged by information with statutory rape, alleged to have been committed by one Orville Taggart, aided and abetted by her, upon the person of one May Bartol, in the county of Del Norte, on or about the eighth day of February, 1913, and the jury adjudged her guilty of an attempt to commit the crime so charged, and thereupon, as punishment for the crime, the court sentenced her to imprisonment for a term of four years in the state penitentiary.

This appeal is by the defendant from the judgment and the order denying her a new trial.

The information charges that, on the day above named, the defendant "did then and there willfully and unlawfully and feloniously help, aid, assist and abet, one Orville Taggart, in the perpetration and accomplishment of an act of sexual intercourse, then and there committed by the said Orville Taggart, with and upon one May Bartol, who was then and there a female under the age of sixteen years, to wit: of the age of eleven years, and not then and there the wife of the said Orville Taggart," etc.

The trial was had in the superior court of Humboldt County, the cause having been removed to said county for trial on the motion of the defendant for a change of venue.

The first point advanced and earnestly urged by the defendant is that the evidence fell so far short of justifying the verdict that it becomes necessary for this court to now hold that, as a matter of law, it is wholly insufficient to support the conclusion of the jury as thus evidenced.

We are unable, after a full and painstaking examination of the record, to assent to that proposition.

This case is one of a number growing out of substantially the same set of circumstances and of which two have hitherto been submitted to, heard, and decided by this court. (See *People v. Bartol*, 24 Cal. App. 659, [142 Pac. 510], and *People v. Hoosier*, 24 Cal. App. 746, [142 Pac. 514].)

The facts brought out in this case are substantially the same as those developed in the above mentioned cases, in both of which the evidence is given an extended review. It would involve what is conceived would be unnecessary repetition to reproduce herein in detail the testimony taken at the trial of the present case. It will be enough to say that the testimony in this case shows, as it was incidentally shown in the other cases named, that the defendant's part in the transaction was in deliberately holding the prosecutrix down while Taggart was engaged in the act either of accomplishing or of attempting to accomplish copulation with the child. For further and fuller details of the crime reference is made to the cases above referred to.

1. In the Bartol and Hoosier cases, it was vigorously argued that the testimony of the prosecutrix and that of her brother (younger than she), upon which, largely, convictions were

accomplished, was inherently untrue, because of certain inconsistencies and weaknesses appearing therein. We there held that, while there appeared in said testimony some discrepancies, it was a matter entirely within the legal competency of the jury to determine whether, notwithstanding such discrepancies, the testimony of those witnesses was, in the main, entitled to credit and sufficient to generate a conviction, beyond a reasonable doubt, of the guilt of the defendants. In this case, the same is said of the testimony of the same witnesses, and it may be conceded that said testimony is to some extent subject to the criticism so made. We can perceive no reason, however, for forming and entertaining any different view of the testimony of the prosecutrix and her brother in this case from that expressed by this court in the Bartol and Hoosier cases. As stated, the story of the prosecutrix, implicating the defendant in this case in the crime which was perpetrated upon her, is practically the same as that given by her in the other cases, and it was peculiarly a function of the jury to decide the question whether the inconsistencies developed in her testimony were sufficient to impeach the integrity of her declaration that Taggart, aided and assisted by Josie Horn, committed an act of sexual intercourse with and upon her person at the time specified in the information.

2. It was proper, under the information, to allow evidence disclosing that the crime was committed on another day than that fixed in said pleading. The complaint is, in effect, that, because the information states that the offense charged was committed on the eighth day of February, 1913, and the proof shows that it was committed on the thirteenth day of said month, there is a fatal variance between the pleading and proof in that regard, or that a different crime from that alleged was proved.

The information declares, as seen, that the crime charged was committed "on or about the 8th day of February, 1913," and "before the filing of this information." Time is not of the essence of the crime of rape and, under the allegations of the information as to time, it was competent for the people to show that the crime described in the information was committed on some other day than that specially named as the day in near proximity to which the criminal act occurred. Of course, where, in a rape case, it is claimed that several different felonious acts of sexual intercourse have taken place on

as many different days between the defendant and the prosecutrix, it is the duty of the people, in the prosecution of the defendant, to select some particular time at which such act was committed and address their proof to the establishment of the crime at such time. This course is necessary in order that the accused may be informed of the particular criminal act against which he will be required to defend himself, and it is the course pursued by the district attorney in this case. In fact, we do not understand that more than one act of intercourse is claimed to have been committed in this case.

3. The action of the court in the giving and the refusal to give certain instructions is assailed. The assignments under this head are so numerous that we feel compelled to refrain from attempting to give each special notice. Indeed, we do not think it is necessary to do so.

A careful examination of the entire charge of the court has convinced us that thereby the jury were fully and correctly instructed upon all the principles of the law pertinent to the charge set forth in the information. Some of the instructions which were requested by the defendant and disallowed by the court in effect involved instructions upon the facts, and hence were properly refused. For example, it is claimed that the court committed serious error by rejecting the instruction, proposed by the defendant, which would, if given, have impressed upon the jury the importance of the absence of proof that the prosecutrix made complaint of the assault immediately after it occurred. The impression which a jury would likely receive from such an instruction would be that a conviction of the crime of rape could not be legally justified where there was no proof of immediate discovery to some third party by the prosecutrix of the fact of the assault upon her person—that is to say, that the guilt of the accused could not be established beyond a reasonable doubt in the absence of proof of that fact. Of course, such an impression of the law would be obviously unsound and untenable. The fact that the prosecutrix in a case of rape might have made complaint of the assault to a third person immediately after it took place may be shown for the purpose only of corroborating her testimony of the assault. The allowance of such testimony for that purpose is an exception to the general rule against the proof of self-serving declarations. But, although the prosecutrix in this case was in a measure corroborated by the testimony of

her brother, Robert, it is not necessary, to justify and sustain a verdict of guilty of the crime of rape, that the prosecutrix should be corroborated, and whether there has or has not been such corroboration of any character in any case where the law does not expressly require it, is a matter upon which argument may be addressed by counsel to the jury, but upon which the court cannot instruct the jury without verging very closely upon the domain of fact.

The case of *People v. Hamilton*, 46 Cal. 540, cited by the defendant, does not hold that it is the duty of the court to read to the jury such an instruction as the one under consideration here. The reversal in that case was grounded upon the fact that the prosecutrix, under the age of thirteen years when the alleged crime of rape was committed upon her, was the only witness to the alleged assault and that her story was of such questionable verity as to have justly created a reasonable doubt in the minds of reasonable men of the defendant's guilt. She had testified that she made no outcry at the time of the assault or made the fact of the assault known to any person until two years after it was committed, that she suffered or complained of no bodily pain and admitted that no flow of blood followed the alleged outrage. Under this testimony, the court said, and which was all that it decided in that case, that "it is almost inconceivable that a jury, free from passion or prejudice, would not, at least, have entertained a reasonable doubt as to the guilt of the defendant."

4. The court properly refused to allow the defendant's instruction No. 10, whereby the jury would have been told that it was their duty to consider, in connection with the absence of proof that the prosecutrix complained to others of her treatment by the defendant immediately following the assault, the testimony of the doctors who professionally examined the sexual organs of the prosecutrix for the purpose of determining whether there existed therein conditions indicating that she had been subjected to acts of sexual intercourse. The court, in its charge, instructed the jury that it was their duty to consider all the admitted evidence and to be governed entirely by that evidence in solving the question of the guilt or innocence of the accused, and even if the practice of pointing out and thus calling the jury's attention to particular evidence or the want of evidence on some particular point in the charge of the court to the jury were to be commended (and, as a rule,

it certainly is not), the general instructions sufficiently covered the proposition sought to be given to the jury through the rejected instruction, and, therefore, in any event, its disallowance cannot be denominated prejudicial error.

5. The defendant's refused instruction No. 11 is not only argumentative, but would have instructed the jury that it was their duty to "scan the testimony of the prosecuting witness carefully to ascertain if she would be likely to have a design to warp her testimony to the prejudice of the defendant," and that they were at liberty to disregard her testimony. Argumentative instructions are not permissible and should never be given. As to the duty and right of the jury in the matter of disposing of the testimony of the prosecutrix or as to how they should act thereon, it is to be said that the court's charge contained such full, clear, and correct information upon the general subject of their duty with respect to the evidence that the jury could not have misapprehended the extent of their discretion in the matter of determining the credence and weight to which it was entitled. The instruction was properly disallowed.

The court refused and gave in modified form other instructions proposed by the defendant, and error in such action is assigned. We have examined these assignments carefully, and are upon such examination persuaded to say generally that, as to the instructions refused, they were either objectionable because they involved erroneous statements of the law or unnecessary because the principles therein stated were covered and fully declared in the general charge of the court. Nor do we perceive any error in the action of the court in modifying the instructions proposed by the defendant and, as so modified, given to the jury.

6. Objection is, however, seriously urged against the given instruction telling the jury that, under the evidence, they were authorized to find the defendant guilty of an attempt to commit rape. The defendant contends that such instruction was not only erroneous but that the verdict cannot, as a matter of law, be upheld, because, so it is argued, the evidence, if it shows the commission of any crime at all, discloses that the crime of rape itself was committed, and that where the proofs show that the crime of rape itself has been in fact committed, a verdict finding the accused guilty of an attempt to commit said crime is not sustainable.

In support of that proposition, counsel cite the case of the *State v. Mitchell*, 54 Kan. 516, [38 Pac. 810]. In that case, the defendant, who was charged with the crime of rape, was convicted of the crime of an attempt to commit rape upon the testimony alone of the prosecutrix, who positively testified that the defendant forcibly ravished her while they were traveling together in a buggy. The case was reversed for the reason, so it was stated, that the verdict was predicated upon the discredited testimony of the prosecutrix, the court saying *inter alia*: "There is no other testimony in this case of any fact or circumstance, or of any act or declaration of the defendant, which is inconsistent with his entire innocence of any offense. The conviction, therefore, rests solely on the testimony of a witness whom the jury by their verdict have discredited and disbelieved as to the most important fact stated by her on the witness stand, and the fact concerning which, above all others, she could not possibly be mistaken. This court will not uphold a judgment resting for its only support on such a foundation. Section 418 of chapter 31 of the General Statutes of 1889, concerning crimes and punishments, provides: 'No person shall be convicted of an assault with intent to commit a crime, or of any other attempt to commit any offense, when it shall appear that the crime intended or the offense attempted was perpetrated by such person at the time of such assault, or in pursuance of such attempt.' If this witness told the truth, the section of the statute above quoted has been disregarded. If she was unworthy of belief, the jury should have acquitted altogether."

The above case is not in point here for two reasons, viz.: 1. The testimony of the doctors, so far as we are able to judge it, was sufficient to create considerable doubt—perhaps, a reasonable one—upon the question whether Taggart actually accomplished penetration of the private parts of the prosecutrix. Some doubt would also seem to have arisen from the testimony of the brother of the prosecuting witness as to whether actual penetration was accomplished. We may, therefore, assume that the jury, while convinced that Taggart, aided by the defendant, got the little girl down on the bed and pulled up her clothes and thereupon, with his pantaloons unbuttoned, got on top of her, entertained a reasonable doubt, from the testimony of the doctors and Robert Bartol, as to whether he succeeded in inserting his privates into those of the prosecutrix.

In the Kansas case, it will be kept in mind that there was no testimony showing or tending to show any other crime than that of rape. 2. Our Penal Code (sec. 1159), unlike and, indeed, the very reverse of the Kansas law upon the subject, provides: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." And, under our law (Pen. Code, sec. 663), a person prosecuted for an attempt to commit a crime, may be convicted thereof, although the evidence may show that the crime intended or attempted was perpetrated by the accused in pursuance of such attempt, "unless the court, in its discretion, discharges the jury and directs such person to be tried" for the crime itself. This section is evidently the outgrowth of the well-conceived theory, the crystallization of which into practical application can manifestly result only in a convenient and at the same time just administration of the criminal law, that a charge of crime in an indictment or information necessarily includes the charge of an attempt to commit such crime and that evidence of its perpetration necessarily involves evidence of an attempt to perpetrate it, for it is not conceivable that any crime can be committed in the absence of an attempt to commit it. There must be a starting point in the actual commission of crime and obviously such starting point is the attempt. The actual commission of the crime is, in brief, the execution of the attempt. We can, therefore, perceive no sound reason for holding that the principle stated in section 663 of the Penal Code should not as well be applicable in a case where the charge is of the crime itself and thus a conviction of an attempt to commit it sustainable. But, as before suggested, it is certainly applicable in such a case where there is, as here, evidence from which the jury could have concluded that, rather than the crime itself, the accused has been guilty of an attempt to commit it.

7. It is lastly contended that the defendant's motion for a new trial should have been granted on the ground of the alleged misconduct of one of the jurors during the progress of the trial.

The showing upon this point by the defendant tended to the establishment of the fact that juror Sutherland, had, while the trial of the cause was still in progress, and during the adjournments of the court, referred to the case in a conversation with

one Colcord and on another occasion discussed with or expressed to one Sample his conception of the merits of the case and declared his intention of voting for a verdict of conviction. The juror filed a counter affidavit, in which he declared that he had no such conversations with Colcord and Sample as were testified to by them, and that at no time did he express any opinion upon the question of the guilt or innocence of the defendant or state to Sample that he intended to vote to convict the accused.

Other affidavits were filed in which the affiants deposed that the general reputation of juror Sutherland for honesty, honor, and integrity in Humboldt County was of the very best.

Without discussing the question whether the verdict of a jury may be impeached in the manner attempted here, it is enough to say that there exists in the evidence a conflict upon the question whether the juror demeaned himself in the manner imputed to him by the affidavits and testimony presented by the defendant and that the finding of the trial court in favor of the people upon that question is, therefore, binding upon this court.

We have now considered and noticed all the points pressed upon us for a reversal which, after a circumspect examination of the record, we have conceived to be entitled to special attention, and have thus encountered no just reason calling for a disturbance of the result reached by the jury or the action of the court in denying the defendant's motion for a new trial.

The judgment and the order appealed from are, accordingly, affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal was denied by the supreme court on December 5, 1914.

[Civ. No. 1619. Second Appellate District.—October 9, 1914.]

AL McRAE, Petitioner, v. SAMUEL PINE et al., Respondents.

RIGHT TO CONDUCT BUSINESS—SELLING LIQUOR NOT INHERENT RIGHT.—

It is only a calling not in any way injurious to the community which every one has a right to pursue; and there is no inherent right in a citizen to sell intoxicating liquors.

ID.—REGULATION OF LIQUOR BUSINESS—RESTRICTION AS TO LOCALITY—

ARTICLE XI, SEC. 11 OF CONSTITUTION.—Under article XI, section 11, of the constitution of California, any county, city, town or township has the right to wholly prohibit the carrying on of the retail liquor business, and the power to prohibit includes the power and right to regulate by the imposition of conditions and restrictions, a legal mode of restriction being the determination of the places in the county where such business may or may not be carried on.

ID.—COUNTY ORDINANCE—RETENTION BY SUPERVISORS OF RIGHT TO REGU-

LATE LIQUOR BUSINESS.—A county ordinance regulating and providing for the licensing of various kinds of business, which provides that before a license may issue for carrying on the business of a retail liquor establishment, an application shall be filed with the clerk of the board of supervisors, and that after the publication of certain notices, the board "shall thereupon proceed to hear any testimony offered, either in support of or against such application for license, and may refuse to allow a license to issue thereunder, if, on such hearing, it shall appear to the satisfaction of the board, . . . that in the judgment of said board it would not be for the welfare of the people residing in said precinct or of the county to have the business mentioned in said application carried on in such precinct, . . . or that there is any other sufficient reason for such refusal, whether shown by protest on file, location of business, or otherwise," does not take away from the board its right to refuse to grant a license for such business in any location where, after considering the facts, it is the judgment of the board that the business should not be located in that place, notwithstanding no testimony was offered against an application for a license, or objection made to the personal character of the petitioner, or exception taken to the form, substance, or sufficiency of the petition, or to the regularity of any of the proceedings; and notwithstanding, also, that the majority of the voters in the precinct where the business was to be carried on voted in favor of granting such license at the last general election.

ID.—APPLICATION FOR LIQUOR LICENSE—PROVISION OF ORDINANCE FOR SUBMISSION TO VOTE OF PEOPLE—SUPERVISORS' POWER TO REFUSE NOT AFFECTED BY.—A provision in such an ordinance that no appli-

cation for either a wholesale or retail liquor license shall be granted unless the petition shows that at the last general election at which the question of granting retail and wholesale liquor licenses was submitted to the vote of the people of the county, a majority of the votes cast upon the question in the voting precinct in which the business was to be carried on, was in favor of granting such license, while preventing the granting of such a license by the board, if a majority of the votes is against it, does not prevent the board refusing such license, although a majority of the votes were in favor of it.

MANDAMUS—NOT WRIT OF RIGHT—SHOULD NOT ENFORCE TECHNICAL COMPLIANCE CONTRARY TO SPIRIT OF LAW.—The writ of *mandamus* is not wholly a writ of right, but lies, to a considerable extent, within the sound judicial discretion of the court where the application is made; and no court should allow a writ of *mandamus* to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law.

ID.—WHEN MANDAMUS DOES NOT LIE TO COMPEL GRANTING OF LIQUOR LICENSE.—*Mandamus* will not lie to compel the board of supervisors to issue a license to the petitioner in such a case, which could only be granted upon a technical construction of the ordinance in his favor, contrary to the spirit of the law which intends that such matters shall remain within the power of regulation of the county through its authorized officers.

APPLICATION for a Writ of Mandate, originally brought in the District Court of Appeal of the second appellate district, to compel the board of supervisors of San Bernardino County to issue to the petitioner a license to carry on the business of a retail liquor establishment in the town of Daggett in said County.

The facts are stated in the opinion of the court.

G. M. Pittman, for Petitioner.

R. B. Goodcell, for Respondents.

CONREY, P. J.—In this proceeding the petitioner seeks to obtain a writ of mandate requiring the board of supervisors of the county of San Bernardino to issue to him a license to carry on the business of a retail liquor establishment in the town of Daggett, Daggett voting precinct, in that county.

Ordinance No. 110 of the county of San Bernardino is an ordinance regulating and providing for the licensing of various kinds of business. It is provided that before a license

may issue for carrying on the business of a retail liquor establishment, as defined in the ordinance, an application shall be filed with the clerk of the board of supervisors. It is required that after the publication of certain notices the board of supervisors "shall thereupon proceed to hear any testimony offered, either in support of or against such application for license, and may refuse to allow a license to issue thereunder if, on such hearing, it shall appear to the satisfaction of the board, . . . that in the judgment of said board it would not be for the welfare of the people residing in said precinct or of the county to have the business mentioned in said application carried on in such precinct, . . . or that there is any other sufficient reason for such refusal, whether shown by protest on file, location of business or otherwise."

"No application for either a wholesale or retail liquor license shall be granted, unless the application shows that, at the last general election at which the question of granting retail and wholesale liquor licenses was submitted to the vote of the people in the county of San Bernardino, a majority of the votes cast upon the question in the voting precinct in which the business is to be carried on, was in favor of the granting of retail and wholesale liquor license."

This case is submitted for decision upon a general demurrer to the petition, with the understanding that, after ruling upon the demurrer, the court shall proceed to a judgment on the merits by either granting or refusing the peremptory writ demanded by the petition. The petition shows that the petitioner duly presented his application to the clerk of the board of supervisors and the required notices were given. The matter came regularly before the board of supervisors and a hearing was had as hereinafter stated. At the last general election preceding the filing of said application a majority of the votes cast in Daggett voting precinct upon the question of granting retail and wholesale liquor licenses was in favor of the granting thereof. At the hearing of petitioner's application before the board no evidence whatever was offered against said application for the license; nevertheless, the board of supervisors rejected the application and still refuse to grant the same. In taking such action the board of supervisors took no exception whatever to the form, substance, or sufficiency of the application, or to the personal character or standing in the community of the petitioner. Petitioner was a fit and proper

person to be granted a license for the purpose of carrying on the business of a retail liquor establishment. These being the facts, the petitioner alleges that the action of the board was purely arbitrary and entirely without cause and was not in the exercise of any right conferred on the board by ordinance, and was without lawful right or authority. A stipulation has been filed that a certain copy of portions of the minutes of the board of supervisors pertinent to the issues raised herein may be considered as a part of petitioner's petition. These minutes show that when the application was taken up for hearing and consideration no testimony was offered against the issuance of the license. Al McRae, the applicant, was duly sworn and examined, "and gave testimony in favor of the issuance of said license in accordance with the terms of said application." No further testimony was given, and thereupon the board denied the application "upon the ground that in the judgment of this board it would not be for the welfare of the people residing within said Daggett voting precinct or of the county to have the business mentioned in said application, to wit the business of a retail liquor establishment, carried on in said Daggett voting precinct."

That there is a difference between the legal obligation to issue licenses (where such licenses are provided for as a condition to carrying on business) for the carrying on of ordinary commercial occupations and the obligation to issue such licenses for the business here in question, is not to be denied. There is no inherent right in a citizen to sell intoxicating liquors. "It is only a calling not in any way injurious to the community which every one has a right to pursue. That the legislative power may prohibit a traffic by retail of intoxicating liquors is conceded. If the governing power can prohibit a thing altogether, it may impose such conditions upon its existence as it pleases, even arbitrary ones. The constitutional requirement with reference to uniformity in operation of all laws of a general nature has no application to ordinances enacted in pursuance of a legitimate exercise of the police power, and only when it is manifest that there is an unjust discrimination do courts interfere." (*In re Kidd*, 5 Cal. App. 159, [89 Pac. 987]; *In re Cutting*, 17 Cal. App. 604, [120 Pac. 304].) Under article XI, section 11, of the constitution of California, any county, city, town or township has the right to wholly prohibit the carrying on of this business. (*Ex parte*

Campbell, 74 Cal. 20, [5 Am. St. Rep. 418, 15 Pac. 318]; *Reed v. Collins*, 5 Cal. App. 494, 498, [90 Pac. 973].) The power to prohibit the business includes the power and right to regulate by the imposition of conditions and restrictions. The determination of the places in the county where such business may or may not be carried on is a legal mode of restriction. These rules or principles being established, it follows that the board of supervisors might legally prohibit the proposed business of petitioner in Daggett precinct, unless by the said ordinance the board has established a local law which prevents it from exercising that authority.

The paragraph above quoted from the ordinance would prevent the granting of a license to petitioner if a majority of the votes cast upon the question in Daggett voting precinct had been against the granting of such licenses. But it does not follow that a vote in favor of granting such licenses has imposed on the board of supervisors any duty to grant the license applied for, or has interfered with the discretion lodged in it by law to regulate and restrict the business within the county and at any and all places within the county. The sole object of the provision for a vote by the people of the precinct was that the people might have an opportunity to effectively protest against and prohibit the business in those precincts where a majority of the voters consider that the maintenance of such business is injurious to them. So far as the people of the locality are concerned, the local option clause of the ordinance gives nothing more than a power of veto against the business.

Turning now to the provisions of the ordinance first above quoted, we find that, notwithstanding the absence of any other objection, the board of supervisors may refuse to allow the license, "if on such hearing it shall appear to the satisfaction of the board, . . . that in the judgment of said board it would not be for the welfare of the people residing in said precinct or of the county to have the business mentioned in said application carried on in such precinct, . . . or that there is any other sufficient reason for such refusal, whether shown by protest on file, location of business, or otherwise." On the record here presented, we are unable to say that the action of the board was without some sufficient reason arising out of the "location of business or otherwise." As before stated, it appears that at the hearing before the board of supervisors the applicant "was duly sworn and examined and gave testi-

mony in favor of the issuance of said license in accordance with the terms of said application." This does not necessarily mean that all of the facts elicited by his testimony were such facts as necessarily compelled the exercise of the board's discretion in favor of the granting of the license. The geographical location and surroundings of Daggett precinct are matters of which the board may take judicial notice. The examination of the applicant may have included a cross-examination which may have developed facts unfavorable to the granting of the license. Petitioner's allegation that the action of the board in refusing his petition was purely arbitrary and entirely without cause is a statement of his conclusion or opinion and is not to be accepted as a statement of fact, unless the statement of actual facts necessarily supports that conclusion.

Taking the license ordinance and considering it in connection with the section of the constitution to which we have referred, and with the principles of law specially applicable to those kinds of business which are peculiarly subject to police regulation (as is the business of retailing intoxicating liquors), we arrive at the conclusion that the said ordinance was not intended to and does not take away from the board of supervisors its right to refuse to grant a license for such business in any location where, after considering the facts, it is the judgment of the board that the business should not be located in that place.

"The writ of *mandamus* is not wholly a writ of right, but lies, to a considerable extent, within the sound judicial discretion of the court where the application is made; and no court should allow a writ of *mandamus* to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law." (*State v. Commissioners of Phillips County*, 26 Kan. 419; quoted with approval in *Wiedwald v. Dodson*, 95 Cal. 450, 454, [30 Pac. 580].) Under the circumstances here shown, the writ of mandate applied for by the petitioner could not be granted except upon a technical construction in his favor, of the ordinance in question, contrary to the spirit of the law which intends that such matters shall remain within the power of regulation of the county through its authorized officers.

The petition for the writ is denied.

James, J., and Shaw, J., concurred.

[Civ. No. 1446. Second Appellate District.—October 9, 1914.]

HAMBRIGHT & WALSH COMPANY (a Corporation),
Appellant, v. **PROVIDENT PLEDGE CORPORATION**
(a Corporation), Respondent.

FINDINGS—UNCERTAINTIES—CONSTRUCTION IN FAVOR OF JUDGMENT.—

It is a rule of law that any uncertainties or ambiguities in findings must be construed, if possible, so as to support the judgment.

CONSIGNED JEWELRY—AUTHORITY OF CONSIGNEE TO SELL—PLEDGE BY CONSIGNEE—VIOLATION OF TRUST—OWNER NOT ENTITLED TO RECOVER WITHOUT PAYMENT OF LOAN.—Where a wholesale dealer or jobber delivers certain jewelry to a person in the retail jewelry business for the purpose of inspection by prospective customers of the latter, and authority is given the retailer to sell the same to his customers, if possible, at a price fixed by him, and in the event of such sale, he to pay the wholesaler the price agreed upon therefor, otherwise to return it, the transaction vests in the retailer apparent ownership of the property, and where the latter, instead of selling the goods and paying the wholesaler, as it was intended he should do, pledges them, in violation of his trust, for a loan to himself, the wholesaler is not entitled to recover possession of the property from the pledgee without first paying the amount for which it was pledged.

ID.—CASE WITHIN SECTION 2991 CIVIL CODE.—Such a case comes within the provisions of section 2991 of the Civil Code, which provides that "one who has allowed another to assume apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business and for value."

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Loeb & Loeb, for Appellant.

Arthur Wright, for Respondent.

SHAW, J.—This was an action to recover possession of certain personal property title to which, as alleged, was vested in plaintiff.

Plaintiff was a wholesale dealer or jobber in the sale of jewelry. One C. P. Osgood was engaged in the retail jewelry business and on occasions found customers who desired to purchase goods which he did not carry in stock. From time to time he applied to plaintiff for such articles, which it intrusted to him upon consignment thereof and if they were sold or retained by him they were either paid for or a charge made against him for the same; otherwise they were returned to plaintiff. About November 7, 1912, Osgood received from plaintiff the goods in question, consisting of two diamonds and one diamond ring. With their delivery there was also delivered to Osgood by plaintiff a memorandum as follows:

"Memorandum. From Hambright & Walsh, 342 South Broadway, Phone A 3204, Los Angeles, Cal. N. B.—These goods are sent for your inspection and are delivered upon the express understanding that the title thereto shall remain in Hambright & Walsh until the purchase price is fully paid. Los Angeles, November 7, 1912. Consigned to C. P. Osgood, City. (Then follows a description of the goods.) Important. When reporting on these goods, please return this bill and see that it is receipted and returned to you."

A few days after receiving the goods from plaintiff, Osgood, without paying for the same, pledged them to defendant to secure the payment of four hundred and fifty dollars. The action is to recover possession of the jewels. The court adjudged that plaintiff was entitled to possession of the goods only upon paying to defendant the amount for which they were pledged.

From this judgment plaintiff appeals, adopting the alternative method in presenting the record.

The court found that the goods were delivered to Osgood by plaintiff, as stated, together with the memorandum therewith, stating briefly a description of the property and the price at which it would sell the same, and that plaintiff "agreed with said Osgood . . . substantially that it would transfer and convey to him or to his order said property or any part thereof upon certain terms and conditions not stated in said memoranda, or upon the happening of events not stated in said memoranda." And also found "that said delivery was made in said manner with the real intent and agreement upon the part of the plaintiff that the said Osgood might sell or otherwise dispose of said property provided he

paid plaintiff plaintiff's said stated price therefor, or other price that plaintiff might accept, at time or times and upon terms and conditions set out." As a conclusion of law the court found that, in the manner heretofore found, "plaintiff delivered said personal property to the said Osgood and allowed him to assume the apparent ownership of said property for the purpose of making a transfer of it."

Appellant attacks the judgment upon the ground that it is not supported by the findings. The findings are not as clear and explicit as they should be. Nevertheless, it is a rule of law that any uncertainties or ambiguities in findings must be construed, if possible, so as to support the judgment. (*Breeze v. Brooks*, 97 Cal. 77, [22 L. R. A. 257, 31 Pac. 742]; *People v. McCue*, 150 Cal. 195, [88 Pac. 899]; *Murphy v. Stelling*, 8 Cal. App. 702, [97 Pac. 672].) The memorandum delivered with the goods does not purport to show the making of a conditional sale to Osgood, or in fact that any sale of the goods was made to him; hence the transaction cannot be construed as a conditional sale. While, as stated, the goods were delivered to Osgood for his inspection, the title to remain in plaintiff until the purchase price was fully paid, it was further agreed, as found by the court, that Osgood might sell or dispose of the same, provided he made payment therefor to plaintiff. In other words, while Osgood, as shown, was authorized to sell the goods, plaintiff insists no title could pass unless he paid plaintiff the agreed purchase price of the goods, thus imposing upon the one purchasing from Osgood the duty of seeing that the money paid for the goods so bought was delivered to plaintiff, who was unknown in the transaction. Notwithstanding the findings are awkwardly drawn, it sufficiently appears therefrom that in the transaction between Osgood and plaintiff the former was authorized to make a sale and transfer of the goods. As we view the finding, it brings the case within the provisions of section 2991, of the Civil Code, as follows: "One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value."

Thus construed, appellant insists the findings are not supported by the evidence. A brief reference to the evidence

shows that this contention is also without merit. According to testimony given on behalf of plaintiff, its business transactions with Osgood commenced about a year before the transaction in question. Osgood, to whom plaintiff extended some credit, carrying his name upon its ledger, received goods from plaintiff on consignment. These goods he would display in his place of business. A witness for plaintiff testified as follows: "He (Osgood) sold the goods, . . . on the installment plan, the same as any of these retail houses, at so much down and so much a month. Q. Then how did he report to you and how did he pay you? Tell us in full. A. Immediately when he had sold a watch or any other item to any person, he would either pay us at once, or we would charge him on the ledger; our transaction was ended as far as the sale was concerned; then it was a matter of collecting the money. Q. Then whom would you collect the money off? A. C. P. Osgood. Q. You didn't know who the purchaser was, did you? A. No sir, we had nothing to do, we did not—we sell only to retail jewelers; we don't sell to the customer direct. Q. You trusted Osgood in those particulars? A. Yes sir. Q. Now, where he would sell something on the installment plan, would you wait until he had been paid? A. We had nothing to do with that; we charged the goods on our ledger and expected our pay on regular time." It may be conceded that reading the entire testimony given on behalf of plaintiff discloses inconsistent statements, some of which are made by the same witness. The weight accorded such testimony, however, is for the trial court to pass upon. The evidence taken as a whole fairly justifies the inference that plaintiff delivered the goods in question to Osgood, not for his inspection, but for the inspection of his prospective customers to whom it was understood and intended that he should, if possible, at a price fixed by him, sell the goods, in which event he should pay plaintiff the agreed price therefor; otherwise return them. Under the laws of this state one may make a conditional sale, delivering possession of but retaining title to the property, in which case the seller may recover possession where a transfer of title is attempted without compliance with the conditions. The case at bar presents no facts bringing it within this rule. The fact that Osgood instead of selling the goods and paying plaintiff as it was intended he should do, violated the trust reposed in him by

pledging them in payment for a loan, does not entitle plaintiff to a recovery from one having no knowledge of the arrangement and who, upon faith of the apparent ownership with which plaintiff had clothed the possessor, parted with his money in exchange for the goods.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1564. Second Appellate District.—October 10, 1914.]

R. E. HILLGER, Respondent, v. N. YENRICK, Appellant.

APPEALS—ACTION IN JUSTICE'S COURT—APPEAL TO SUPERIOR COURT—JUDGMENT FINAL.—A judgment of the superior court on appeal, in an action originally brought in the justice's court to recover the sum of one hundred dollars, alleged to have been paid as part of the purchase price of certain lots of land, which defendant agreed to transfer to plaintiff, the contract being evidenced by a writing in the form of a receipt, which provided the balance of the purchase price should be paid upon a showing within fifteen days from date that the title of the property was free from all encumbrances and upon the execution of a good deed, and providing further that the deposit should be returned to the purchaser if the certificate of title showed the property not to be free from encumbrances, is final, and no appeal lies from the judgment of the superior court.

Id.—ACTION FOR RECOVERY OF MONEY—TITLE TO PROPERTY NOT INVOLVED—JUSTICE'S COURT JURISDICTION NOT OUSTED BY COUNTERCLAIM.—Such an action is one at law for the recovery of money only, and a verified answer and counterclaim, upon which defendant took issue on the facts alleged in plaintiff's complaint and sought to recover the balance of seven hundred dollars, which plaintiff had agreed to pay upon the conditions of the contract in his favor being performed, and on which defendant moved to have the case certified to the superior court, upon the ground that it raised a question as to the title or right to the possession of real property, does not raise such question, and the fact that the defendant sought by counterclaim to recover more than the amount fixed as the limit of the jurisdiction of the justice's court could not oust that court of jurisdiction. While the alleged counterclaim might have been stricken from the files, no error was committed by the justice in proceeding to trial without taking such action.

APPEAL from a judgment of the Superior Court of San Diego County. W. A. Sloane, Judge.

The facts are stated in the opinion of the court.

Theron Stevens, and J. R. Gilliland, for Appellant.

Young C. Burkhardt, for Respondent.

THE COURT.—This action was originally brought in the justice's court to recover one hundred dollars alleged to have been paid by respondent as part of the purchase price of certain lots of land in the county of San Diego which appellant agreed to transfer to him. The contract was evidenced by a writing in the form of a receipt which, after setting forth a description of the property and the fact of the payment of one hundred dollars, provided that the balance of the purchase price should be paid "upon delivery certificate complete to date of transfer from a responsible abstract company in the city of San Diego; said certificate to show said property free from all encumbrances and execution of good and sufficient deed, on or before fifteen days from date. . . . And if the balance of dollars is not paid as stipulated and agreed, the above contract is null and void, and all moneys paid shall be forfeited as agreed damages for failure of purchaser to perform this contract. Should such abstract or certificate show the title to said property as not being free from encumbrances as above stated, the deposit shall be returned to said purchaser." The respondent alleged in his complaint that he had been ready to perform and had performed all of the obligations required of him, but that more than fifteen days had elapsed and that the appellant had failed to deliver to him a deed or furnish the certificate in the manner agreed. In the justice's court appellant filed an answer and counterclaim in which he took issue on the facts alleged in plaintiff's complaint and sought to recover the balance of seven hundred dollars which respondent had agreed to pay upon the conditions of the contract in his favor being performed. This answer and the counterclaim as filed in the justice's court were verified, appellant seeking thereby to raise a question as to the title or right to possession of real property which would oust the justice's court of juris-

diction. However, the justice of the peace proceeded to try the action and, notwithstanding a motion to have it certified to the superior court, judgment was rendered for one hundred dollars as prayed for in the complaint, and an appeal was then regularly taken to the superior court. We must assume that the appeal was taken on questions of both law and fact, for the contrary does not appear, and the superior court proceeded to hear and determine all of the issues in the case, both law and fact, anew. A demurrer to the complaint was sustained and an amended complaint was filed which set out with more detail the circumstances of the contract and the actions of the parties had in connection therewith, and again repeated the prayer for judgment in the sum of one hundred dollars. A demurrer stating general grounds was filed to the amended complaint and overruled. Appellant then filed an answer and what he termed a cross-complaint, repeating in effect all of the allegations set up by his alleged counterclaim in the justice's court. The respondent made no answer to the cross-complaint and the action went to trial as to the issues made upon the amended complaint and the denials contained in the answer. Again judgment was rendered in favor of the plaintiff for the sum of one hundred dollars and costs. This appeal, taken from that judgment, followed.

The action was an action at law for the recovery of money only and involving an amount within the jurisdiction of the justice's court. No question concerning the matter of title or possession of real property was shown to be involved from the contents of the answer as filed, or the counterclaim. The fact that the defendant sought by counterclaim to recover more than the amount fixed as the limit of the jurisdiction of the justice's court, could not oust that court of jurisdiction. The justice of the peace might have stricken the alleged counterclaim from the files, but he did not commit error in proceeding to the trial without taking such action. In the superior court the alleged cross-complaint seems to have been ignored by both the respondent and the trial judge. It was improperly on the files of the court, and it must be assumed, if it is necessary so to do to support the judgment, that it was so disregarded and treated as of no effect. We do not think that the superior court attempted to exercise original jurisdiction at the trial of the action, as it rendered judgment for only the amount of one hundred dollars and

attached costs thereto as part of the recovery, which could not have been done had the action been one of original jurisdiction with that court. Such a state of facts being disclosed, it is manifest that no appeal could properly have been taken from the judgment last entered to this court, as the judgment of the superior court was final.

It is ordered that the appeal be dismissed, with costs to the respondent.

[Civ. No. 1666. Second Appellate District.—October 13, 1914.]

I. L. MILLER et al., Petitioners, v. SUPERIOR COURT OF THE COUNTY OF KERN et al., Respondents.

PRIMARY ELECTION LAW—CONTEST TO NOMINATIONS—TIME FOR FILING—WHEN COMMENCES.—The five days' time provided by the primary election law of 1913 (Stats. 1913, p. 1379) for filing of contests to nominations of candidates for office does not begin to run until the board of supervisors has declared the result of the canvass of the returns, and contests filed on the fifth day after the supervisors have declared the result of the canvass of the returns are filed within due time.

ID.—AFFIDAVIT OF CONTESTANT—BASIS OF CONTEST.—The affidavit of the candidate, provided for by section 28 of said act, is the basis of the contest in which the ballots may be recounted before the superior court.

ID.—CANVASS OF RETURNS—DELAY OF SUPERVISORS—RIGHTS OF CANDIDATES.—The portion of the primary election law relating to the canvass of returns contemplates prompt action in order that the names of the persons nominated may be known in due time, so that they may be placed upon the ballot for the November election, and careful compliance with the provisions of the law as to the time within which the several acts shall be done is necessary; but this does not compel a construction of the statute, which, in some instances of neglect or misconduct, would make it impossible to ascertain the candidates between whom the choice must be made at the final election. If, by reason of neglect or misconduct, it should appear, after the expiration of the time named in the statute, that the board of supervisors would not declare the result of the canvass, any elector within the county or district might institute appropriate proceedings to compel action by these officers.

ID.—CONTEST TO NOMINATIONS—VOTERS NOT ON REGISTER—ABSENCE OF ORIGINAL AFFIDAVITS OF REGISTRATION—COURT POWERLESS TO RE-

CRIME EVIDENCE OF.—The refusal of the election officers in a primary election to receive the votes of electors whose names did not appear upon the register, and whose original affidavits or duplicates thereof were not at the time in the office of the county clerk, where they were required by law to be, which voters, the affidavit of contest alleges, registered in accordance with law, and would have voted for the contestants, if permitted to cast their ballots, is not a proper ground of contest, and the superior court in a contest to nominations is without right or jurisdiction to receive offered evidence of such facts.

CONTEST SPECIAL PROCEEDING—JUDGMENT NONAPPEALABLE—ILLEGAL GROUNDS OF CONTEST—WHEN PROHIBITION LIES.—Ordinarily the acceptance of such testimony and the use of it by the court in determining the contest would be merely an appealable error, committed by the court in the exercise of its jurisdiction and not in excess of such jurisdiction; but since the contest provided for in section 28 of the primary election law of 1913 is a special proceeding, concerning which it is provided that "such a decision or judgment of the court shall be final in every respect and no appeal can be taken therefrom," it follows that there would be no adequate remedy at law if the superior court, assuming jurisdiction of an alleged contest, should attempt to hear and determine said contest upon allegations which do not legally constitute a ground of contest, and a judgment based upon such alleged fact would be in excess of the jurisdiction of the court and constitutes a proper subject for a writ of prohibition.

APPLICATION for a Writ of Prohibition, originally brought in the District Court of Appeal of the Second Appellate District, to prohibit the Superior Court of Kern County from considering certain grounds of contest on a contest to nominations to the office of County Clerk and County Treasurer.

The facts are stated in the opinion of the court.

E. J. Emmons, J. R. Dorsey, Matthew S. Platz, and George E. Whitaker, for Petitioners.

E. L. Foster, and E. F. Britton, for Respondents.

THE COURT.—The petitioners were candidates at the August primary election of 1914 for nomination as candidates for the offices of county clerk and county treasurer, respectively, of the county of Kern. The board of supervisors of that county, having completed its canvass, has declared that

petitioners have, respectively, received the highest number of votes cast for said offices. Contests are now pending in the superior court of said county, one against the nomination of petitioner I. L. Miller for the office of county clerk, and the other against petitioner Jerry Shields for the office of county treasurer. These contests, having been consolidated for the purposes of trial, are now being tried in said court.

No alternative writ has been issued, but the petitioners and the respondents are before the court at the time of application for the writ, and by stipulation the court will make its order upon the record before it as upon a return to an alternative writ. The record produced consists of the petition for the writ and a transcript of certain evidence that has been taken in the hearing of said contests in the superior court.

On account of the urgency for immediate disposition of the matter, the court on October 8, 1914, in open court, made its order as herein stated. It appears that the actual canvassing of the primary election returns, other than the order of the board of supervisors declaring the result of the canvass, all occurred prior to the eighteenth day of September, 1914, and that the order of said board declaring the result of the canvass was made and entered on the eighteenth day of September. The affidavits of contest were not filed until the twenty-third day of September.

It further appears that in said affidavits of contest it was alleged by each contestant that a large number of alleged voters within various precincts in the county of Kern were not permitted to vote and could not vote, because their names were not upon the register; neither were the original affidavits of registration or duplicates thereof at the time in the office of the county clerk of Kern County, where they are required by law to be; and that a large number of voters who had registered in accordance with law had a right to vote in their several precincts, but were denied the right to vote for the reasons above stated, and that said voters intended to and would have voted for the contestants if they had been permitted to cast their ballots in their respective precincts. It is further shown by petitioners that the superior court in the trial of said contests will permit said alleged disfranchised voters to testify that they registered as electors of said precincts according to law, notwithstanding the fact that their names were "not upon the Great Register" of the county, and

that they would have voted for the contestants if they had been permitted to cast their ballots. It appears that the offer of such evidence having been objected to by the petitioners, the objections have been overruled and the court, unless prohibited from so doing, will hear said evidence and admit the same on the hearing of said contests.

Petitioners insist that upon the facts shown the contests were not filed within the time provided by the primary election law and that the court is without jurisdiction to hear the same. It is further contended by petitioners that the superior court is without jurisdiction to consider said contests in so far as they are based upon said alleged facts with regard to electors whose names are not upon the register and who were not permitted to vote.

The court is of the opinion that the five days' time provided by the primary election law for the filing of contests did not begin to run until the board of supervisors had declared the result of the canvass of the returns; that is to say, not until the eighteenth day of September, 1914; and that the contests having been filed on the fifth day thereafter were filed within due time. Section 22 of the primary election law (Stats. 1913, p. 1379), provides that the board of supervisors shall meet at a specified time to canvass the returns. "When begun the canvass shall be continued until completed, which shall not be later than six o'clock in the afternoon of the sixteenth day following such primary election. The clerk of the board must, as soon as the result is declared, enter upon the records of such board a statement of such result," etc. Section 28 of the same act provides that any candidate at a primary election desiring to contest the nomination of another candidate for the same office "may, within five days after the completion of the final canvass, file an affidavit," etc. This affidavit is the basis of a contest in which the ballots may be recounted before the superior court. September 10, 1914, was the sixteenth day following the August primary election, and petitioners contend: 1. That for the purpose of fixing the time within which a contest may be instituted it must be conclusively presumed that the canvass was completed not later than September 10th at six o'clock in the afternoon; and, 2. That at all events the formal declaration of the result is not a part of the canvass. As part of the first contention petitioners' counsel insist that after the sixteenth day the

board of supervisors was without jurisdiction to do any further acts in connection with the canvass of the returns of said election.

The portions of the law to which we have referred contemplate prompt action in order that the names of the persons nominated may be known in due time so that they may be placed upon the ballot for the November election, and a careful compliance with the provisions of the law as to the time within which the several acts should be done is necessary. But this does not compel us to adopt a construction of the statute which in some instances of neglect or misconduct would make it impossible to ascertain the candidates between whom the choice must be made at the final election. If by reason of neglect or misconduct it should appear, after the expiration of the time named in the statute, that the board of supervisors would not declare the result of the canvass, any elector within the county or district might institute appropriate proceedings to compel action by these officers. The courts are open for such purposes and are expected to dispose of such matters with such promptness as will meet the emergency. Until the board of supervisors has declared the result of the canvass no one is in a position to know whether a contest is necessary to protect any interest that he may have in the result. The preliminary examinations of the returns and computations made thereon are merely the evidence upon which the declaration of the result is made to depend. This declaration bears the same relation to the previous proceedings as the findings and judgment bear to the previous record in an action at law. It is, therefore, our opinion that the words above quoted from section 28, limiting the time for initiating a contest to five days "after the completion of the final canvass," refer to a period of five days after the declaration of the result.

The court is further of opinion that the refusal of the election officers to receive the votes of said electors who were not permitted to vote is not a proper ground of contest and that the superior court is without right or jurisdiction to receive said offered evidence, or to consider the same as a ground of contest. In contests of this character the question is which candidate received the highest number of legal votes, and not which candidate would have received the highest number if every person claiming the right to a vote had been permitted

to do so. It is unfortunate if some electors who made their affidavits of registration in due time before the proper officer were deprived of their right through failure of that officer to preserve those affidavits or any legal evidence of the right of these electors to vote at the election. But a greater evil to the public would follow from the contrary rule. We cannot imagine any rule that would more effectively open the door for successful perjury than a rule which would permit persons to come into court after the apparent result of a close election has been published and allow them to testify that they did make affidavits of registration which have been lost or destroyed, and that if permitted to vote they would have voted for the contestant.

Ordinarily the acceptance of such testimony and the use of it by the court in determining the contest would be merely an appealable error. It would be merely an error of the court in the exercise of its jurisdiction and not action in excess of such jurisdiction. But since the contest provided for in said section 28 is a special proceeding concerning which it is provided that "such decision or judgment of the court shall be final in every respect and no appeal can be taken therefrom," it follows that there would be no adequate remedy at law if the superior court, assuming jurisdiction of an alleged contest, should attempt to hear and determine said contest upon allegations which do not legally constitute a ground of contest. It is reasonable to say that a judgment based upon such alleged facts would be in excess of the jurisdiction of the court and would constitute a proper subject for a writ of prohibition.

In accordance with this opinion, an order has been entered granting the writ of prohibition applied for herein solely and only to the extent that by such writ the superior court of Kern County will be prohibited from considering said ground of contest with respect to the electors above mentioned whose votes were not received at the primary election. As to any other grounds of contest involved in the affidavits of contest to which reference has been made, the petition has been denied.

[Civ. No. 1375. First Appellate District.—October 20, 1914.]

EUREKA MILL AND LUMBER COMPANY (a Corporation), et al., Appellants, v. **JENNIE E. ANDRES** et al., Respondents.

FORECLOSURE OF MECHANICS' LIENS—CLAIM OF ABOGATION OF ORIGINAL CONTRACT BY EXECUTED ORAL CONTRACT—FAILURE OF EVIDENCE TO SHOW.—In this action to foreclose certain mechanics' liens upon the real property of the defendant, it is held that the contention of plaintiffs that the original contract between the parties was abrogated by an executed parol agreement, providing for the erection of a different building, the cost of which, it was claimed, exceeded the sum of one thousand dollars and that, no memorandum of the latter contract being recorded or ever filed, judgment should have been directed to foreclose the liens upon the property for their full amount; and the further contention that the findings are contrary to the evidence, and inconsistent with, and repugnant to, each other, cannot be sustained.

APPEAL from a judgment of the Superior Court of Alameda County. T. W. Harris, Judge.

The facts are stated in the opinion of the court.

W. B. Rinehart, and H. S. Craig, for Appellants.

Samuels & Magnes, for Respondents.

LENNON, P. J.—This is an action to foreclose certain mechanics' liens upon real property owned by the defendant. Judgment was rendered and entered for the plaintiffs, to the effect that the amount of their respective claims of lien should be prorated out of the sum of five hundred and fifty dollars, which the trial court found was the contract price for the erection of a dwelling-house pursuant to the terms of a written contract. Plaintiffs, being dissatisfied with the judgment, have appealed.

Originally there were two independent actions instituted for the foreclosure of the liens in controversy, which for the purpose of trial were consolidated.

The causes of action sued upon arose primarily out of the execution of the following contract:

"The undersigned, W. H. Shaffer, agrees to construct a replica of a three-room bungalow on 14th Street, Oakland, on what is known as the Y. M. C. A. property, excepting as follows: the painting inside and out, the sewer; the same to be constructed on Jones Street, Oakland, for the sum of \$550, and paid for upon conclusion of this agreement or contract.

"Signed this 14th day of July, 1910.

" (signed) W. H. SHAFFER.

" " JENNIE E. ANDRES. "

In the court below it was the plaintiffs' contention that this contract was abrogated by an executed parol agreement providing for the erection of a different building, the cost of which, it was claimed, exceeded the sum of one thousand dollars, and that, as no memorandum of the latter contract was ever filed or recorded, judgment should have been directed, foreclosing the liens upon the property for their full amount. Upon the evidence adduced at the trial, the lower court, in its findings of fact, declared that the written contract was the only one entered into between the parties; and deduced the conclusion of law therefrom that the several lien claimants were limited in their recovery to the contract price therein stated. Counsel for plaintiffs attacks this finding as being contrary to the evidence, and inconsistent with and repugnant to other material findings.

Briefly stated, the evidence adduced upon the entire case discloses the following facts: The defendant desired to erect a duplicate of a certain building on Fourteenth Street in the city of Oakland, and estimated that this could be done for the sum of five hundred and fifty dollars. With that end in view she had several conversations with a contractor named W. H. Shaffer, which culminated in the execution of the contract above recited. Thereupon a rough plan of the building contracted for was made, and was submitted to the defendant for her approval by the contractor. The defendant discovered that a door had been omitted, and the plan was changed accordingly. The defendant had no further conversations with the contractor concerning the cost and construction of the building. The building was constructed according to the plan prepared by the contractor and approved by the defendant.

In substance these are the facts and the only facts of the case; and the finding of the trial court that the building was

erected pursuant to the terms of the written contract is therefore the only finding possible under the evidence.

In support of the contention that the written contract was abrogated counsel for plaintiffs insists that the building as erected was not in fact an exact replica of the Fourteenth Street house referred to in the contract; and in support of this contention relies upon the testimony of two lien claimants to the effect that certain differences existed between the two buildings. The cross-examination of these witnesses discredited, if it did not destroy, their testimony. As against their testimony the defendants produced an architect, apparently a disinterested witness, who testified that he made an inspection of both buildings, and that one was a copy of the other. All of the testimony adduced upon the entire case tends to the conclusion that the building was erected pursuant to the terms of the written contract, and that it was a replica of the building referred to therein. In our judgment there is no evidence of any kind tending to show that the contract was in any manner or at any time departed from, or that a single alteration was made. The testimony of the contractor's brother that certain conversations were had relative to the building after the execution of the contract was subsequently denied by him when the trial court drew his attention to his conflicting testimony; and he then admitted that all conversations relative to the building were had prior to the execution of the contract. The contractor himself was not called as a witness in the case. The claim that the contract was changed by mutual consent is supported only by the statement of the counsel for the plaintiffs.

There is no merit in the claim that the remaining findings in the case are inconsistent and repugnant in themselves.

The judgment appealed from is affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on November 19, 1914.

[Civ. No. 1518. Second Appellate District.—October 22, 1914.]

**F. W. POETKER, Respondent, v. ROSA B. LOWRY,
Appellant.**

ACTION ON PROMISSORY NOTE—PLEADING—NONPAYMENT—INSUFFICIENT ALLEGATION.—In an action on a promissory note where the only allegation of the complaint which purports to aver nonpayment of the note is, "that said defendant has refused and still refuses to pay the same," the complaint fails to state a cause of action, which is not cured by the judgment, and a general demurrer to it should have been sustained.

PARENT AND CHILD—RELATIVE RIGHTS OF FATHER AND MOTHER—SECTION 197, CIVIL CODE.—Where there is no evidence establishing any of the conditions under which the mother could deprive the father of the custody, services, and earnings of a minor child, under section 197 of the Civil Code, the father is entitled to its custody, and the mother has no right, in the absence of the father's consent, to transfer the custody, care, and services of the child to a stranger.

IN.—OBLIGATION OF PARENT TO SUPPORT CHILD—CONTRACT OF PARENT NOT TO SURRENDER CHILD TO STRANGER ILLEGAL.—The law imposes upon parents the duty of caring for, maintaining and supporting their children, and the agreement of the mother of a minor child not to surrender the child to a stranger, who desires to receive, care for, and maintain it, but to retain the custody and continue to care for and support the child herself, is not a legal consideration for a contract on the part of a stranger, who promises to pay the mother the reasonable value of such care and support, and enforcement of such an agreement would also contravene public policy.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Gray, Barker & Bowen, and George A. Skinner, for Appellant.

Bickler & Smith, for Respondent.

SHAW, J.—Action upon a promissory note alleged to have been made by defendant to plaintiff. Judgment went for

plaintiff, from which, and an order denying her motion for a new trial, defendant appeals.

Defendant interposed a general demurrer to the complaint, which was overruled. This ruling is assigned as reversible error. The demurrer was directed to the absence of any allegation in the complaint showing nonpayment of the note. The only statement purporting to constitute such allegation is "that defendant has refused and still refuses to pay the same." That a party suing upon a contract to pay money must allege a breach thereof—that is, nonpayment of the money which he seeks to recover—otherwise his complaint is subject to general demurrer for failure to state a cause of action, is fundamental and must be conceded. The question presented is whether the statement above quoted constitutes a sufficient allegation of such fact when tested by general demurrer. While respondent concedes the complaint to be defective, he insists there is not a total lack of essential allegation, and that such defect is cured by the judgment. We conceive the rule to be that where the statement, though defective, is in the form of a conclusion, or is of a character from which the fact of nonpayment is implied, it is sufficient when measured by general demurrer. In such case the attack must be made by special demurrer, pointing out the defect. Thus, while there are authorities in this state to the contrary, it has been held that in the absence of special demurrer a complaint based upon contract and alleging a breach thereof by stating the sum demanded was due and owing, contains a sufficient allegation of nonpayment. (*Stewart v. Burbridge*, 10 Cal. App. 623, [102 Pac. 962]; *Penrose v. Winter*, 135 Cal. 289, [67 Pac. 772]. See, also, *Knox v. Buckman Contracting Co.*, 139 Cal. 598, [73 Pac. 428], and cases there cited.) The words "due and owing," while a mere conclusion, nevertheless imply a debt matured and, therefore, a breach by reason of its nonpayment, and unless the defect be pointed out by special demurrer, it is cured by verdict or judgment. No conclusion, however, of nonpayment is implied from the allegation that "defendant has refused and still refuses to pay," etc. It is impossible to construe such statement as an allegation of nonpayment of a matured indebtedness. Indeed, the alleged refusal of defendant to pay the note is consistent with the prior payment thereof. Since failure to pay constitutes the breach, the complaint must, in order to state a cause of

action, negative payment. This rule is too firmly established in this state to be disregarded in order to meet the exigencies of a particular case. The court erred in overruling the general demurrer interposed.

The only defense interposed to the action upon the note was stated in a cross-complaint filed by defendant, wherein she alleged that she had the mothering care and custody of a child which John Leggett and wife expressed a wish to take, receive, care for, and maintain, and that she was anxious to surrender the child to them in compliance with such expressed wish and desire, but that plaintiff, with whom she advised, counseled her against so doing and agreed that if she would keep the child and continue to care for and support it, he would compensate her therefor; that in reliance upon such promise she retained and continued to care for and support said child, the reasonable value of such care and support of which was one thousand eight hundred dollars.

The evidence offered under the allegations of the cross-complaint conclusively showed that the child was that of defendant, born to her while living in lawful wedlock with her husband, George Lowry, with whom, so far as shown by the record, she continued to live during all the times in question. It does not appear that her husband, the father of the child, was a party to the alleged agreement, or that he was willing or would have consented, had plaintiff not made the alleged promise, to surrender the care and custody of the child to the Leggetts in accordance with their expressed wish to take and adopt it. So far as shown by the record, he was ignored in the matter. At the close of plaintiff's evidence the court instructed the jury to bring in a verdict for plaintiff, and defendant assigns such ruling as error.

The contention of cross-complainant is that the alleged promise of plaintiff to compensate the mother for supporting her own child constitutes a valid contract, the consideration therefor being the refusal of the mother to avail herself of an opportunity to get a stranger to assume the burden. Section 197 of the Civil Code provides that: "The father of a legitimate unmarried minor child is entitled to its custody, services, and earnings; but he cannot transfer such custody or services to any other person, except the mother, without her written consent, unless she has deserted him, or is living separate from him by agreement. If the father be dead, or be unable, or re-

fuse to take the custody, or has abandoned his family, the mother is entitled thereto." There is no evidence establishing any of the conditions under which the mother could deprive the father of the custody, services, and earnings of his son by giving the child to John Leggett and wife. The father being entitled to its custody, the mother had no right and could not, in the absence of the father's consent, transfer the custody, care, and services of the child to a stranger. That which she refrained from doing in consideration of plaintiff's promise was the nonperformance of an act which under the law she could not do. Moreover, the law imposes upon parents the duty of caring for, maintaining, and supporting their children, and that which defendant did in consideration of plaintiff's promise is exactly that which under the law, and independent of the agreement, she was bound to do. "Any prejudice suffered, . . . other than such as he is at the time of consent lawfully bound to suffer, . . . is a good consideration for a promise." (Civ. Code, sec. 1605.) The agreement on the part of defendant to suffer the burden which the law imposed upon her of looking after and caring for her child, constituted no valid consideration for the alleged contract made with defendant. Aside from the fact that there was no sufficient consideration for the contract, to enforce an agreement of this character would, in our opinion, contravene public policy. There was no error in giving the instruction of which defendant complains.

The judgment is reversed, with instructions that the trial court sustain defendant's demurrer to the complaint and grant plaintiff leave to amend his complaint, if the court be so advised.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1403. Second Appellate District.—October 23, 1914.]

**JOHN HERINGTON, Respondent, v. ALTA PLANING
MILL COMPANY (a Corporation), Appellant.**

AGENCY—ACTUAL AUTHORITY—DEFINITION OF.—Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess.

ID.—BREACH OF CONTRACT—ACTION FOR DAMAGES—OSTENSIBLE AUTHORITY—PARTY MUST HAVE RELIED UPON.—In order that a person dealing with an agent may recover damages for a breach of contract, resting solely upon authority of an ostensible nature, it must have happened that such person, by reason of his reliance upon the ostensible authority, incurred a liability or parted with value.

ID.—AUTHORITY CONFERRED BY WANT OF CARE.—Actual authority, which is conferred through the negligence, or want of ordinary care, on the part of the principal, is only such as the principal allows the agent to believe himself to possess. Whatever strangers may understand to be the limit of actual authority is an immaterial matter, for the implied authority of an agent, upon which third persons are authorized to rely, is the ostensible authority, or that authority, arising by want of ordinary care of the principal, which causes or allows a third person to believe the agent to possess.

ID.—PROPOSAL FOR BUILDING SUPPLIES—LACK OF AUTHORITY.—A solicitor of a corporation, engaged in the business of furnishing building accessories, has no authority, either actual or ostensible, to alter a typewritten estimate of the cost, for which the corporation would furnish certain building materials, where it is shown, upon the face of the offer, that it was prepared in the office of the corporation, and that it bore the signature of a person specially employed as an estimator or calculator, other than the solicitor, and that the person upon whose request the offer was furnished did not act upon it until after it was altered.

APPEAL from a judgment of the Superior Court of Los Angeles County. Franklin J. Cole, Judge presiding.

The facts are stated in the opinion of the court.

Stephens & Stephens, for Appellant.

B. L. Horton, for Respondent.

JAMES, J.—Plaintiff is a building contractor and was engaged in that business during the year 1911. Defendant corporation was at the same time engaged in the business of conducting a milling establishment and furnishing sash, doors, screens, glass, and other building accessories. Plaintiff, intending to offer a bid upon a contract to construct a certain apartment house, requested of the defendant that it furnish to him an estimate of the cost of screens and cabinet work, sash, doors, *et cetera*, which would be required in the construction of that building. The vice-president of defendant, who acted generally as its manager, informed plaintiff that a solicitor of defendant named Stum would see him, and subsequently Stum brought to the plaintiff an offer under the printed bill-head of defendant. This document was typewritten, except that it bore in the lower left-hand corner thereof the name of one Thompson, written in longhand. Thompson, it appeared by the evidence, was a man specially employed as an estimator or calculator. After receiving this proposal, plaintiff proceeded to make his bid for the building contract, and was awarded the work, being the lowest bidder. Some days later he held a conversation with Stum in which he brought up the question as to whether the estimate as furnished included all wire glass required in the building, and in order to meet his objection that the offer was not clear upon this point, Stum wrote in longhand over his own signature the words: "This bid includes all wire glass but elevator enclosures." Thereupon plaintiff placed his signature at the foot of the paper under printed words which were a direction to defendant to enter his order for the materials. Upon this paper being returned to defendant by Stum, and within two days thereafter, defendant by its representative Homann wrote to plaintiff and called his attention to the fact that the bid of defendant did not include all wire glass, because that glass of itself would amount in value to more than two thousand dollars. The total bid as specified in the typewritten document was the sum of \$2,113. In this letter request was made for a new order to be signed by plaintiff, with a notation to be added as follows: "This bid includes all glass in all wooden sash and doors." It appeared that the metal sash into which the bulk of the wire glass used in the building was to be placed was ordered by the plaintiff from another firm and was not intended to be included in the mer-

chandise furnished by the defendant. However, plaintiff insisted that he had made a contract with the defendant by which the latter was obligated to furnish all of the wire glass, whether used in wooden sash or metal sash, as needed in the construction of the building. Defendant flatly refused to furnish this glass or any of the merchandise, and the plaintiff purchased the same elsewhere and brought this action for damages. The trial judge decided the issues in his favor and this appeal was taken from this judgment and from an order denying a motion for a new trial.

The entire case seems to turn upon the one question as to whether Stum, when he indorsed the written paragraph across the face of the typewritten proposal, did so with authority as a representative of his principal. Under the other facts shown in the case this authority must necessarily have been actual authority, which is defined to be such authority "as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (Civ. Code, sec. 2316.) We have said that necessarily, in order to bind the defendant, the authority of Stum must have been actual, and for this reason: The bid as presented to Herington amounted to a mere proposal or offer to make a contract. It was not accepted by the plaintiff, nor attempted to be accepted until after he had secured the contract to construct the apartment house. The offer, as counsel for appellant properly states, might have been withdrawn at any time up to the moment of its acceptance. Therefor, it cannot be said that by reason of any act of the defendant in the way of conferring any ostensible authority upon its agent Stum, damage resulted to Herington. In order that a person dealing with an agent may recover damages for breach of a contract resting solely upon authority of ostensible nature, it must have happened that such person, by reason of his reliance upon the ostensible authority, incurred a liability or parted with value. (Civ. Code, sec. 2334.) So all of the argument, in so far as it touches upon the question of the claimed ostensible authority of Stum, may be left out of account in determining the questions here involved. It was conceded, or at least it appears by every fair inference to be drawn from the testimony of the plaintiff, that Herington did not understand that the proposal of defendant as submitted to him included all wire glass. He insisted upon the clause

mentioned being added thereto. He had never accepted the offer up to the time that this clause was attached to the paper. He testified as follows: "Q. You didn't sign the order for it until you had that written in? A. No. Q. You would not have signed it until you did have that written in? A. No, I don't suppose I would; not after I took the stand." We therefore reach the question as to whether actual authority had been conferred by Stum's principal which would entitle Stum to bind the defendant by a contract such as that which the writing added by him to the bid would create. There was no testimony at all in contradiction of that given by officers of the company and by Stum himself which in positive terms denied that any such authority was conferred. The actual authority which is conferred through the negligence or want of ordinary care on the part of the principal is only such as the principal allows the agent to believe himself to possess. (Civ. Code, sec. 2316.) Whatever strangers may understand to be the limit of actual authority is an immaterial matter, for the implied authority of an agent upon which third persons are authorized to rely is the ostensible authority or that authority arising by want of ordinary care of the principal which causes or allows a third person to believe the agent to possess. As before mentioned, the question of ostensible authority, if any were shown in this case, is wholly immaterial, as it did not appear that through reliance upon any such authority the respondent had suffered damages. The conclusions already suggested are sufficient to indicate that a reversal must be ordered in this case. It may be added that from the evidence it would not seem that Herington was authorized to take it for granted that by reason of his employment as a solicitor, Stum possessed the authority to change, modify, or add to a bid or proposal such as that which was submitted by the appellant. Upon the face of the written offer it clearly appeared to have been prepared in the offices of appellant and it bore the signature of a person other than the solicitor. It was a proposal covering a variety of material and articles which were offered seemingly in competition with other bidders. The evidence that Stum had made two or more offers to other persons to sell them wire glass and had quoted them figures as to the selling price thereof, would not, to our minds, establish such a condition as to authorize a person in respondent's position to assume that Stum possessed authority to alter the written proposal for a

general lot of materials to be used in the performance of a building contract. Moreover, to that written proposal by Stum was attached Stum's signature only and not the signature of appellant corporation, and it appears that plaintiff himself called Stum's attention to the fact and asked why the name of the company was not signed. From this it is shown that the plaintiff had in mind a question as to the authority of Stum to act for his principal. For the reasons stated, we conclude that the evidence was insufficient to sustain the findings and judgment made in favor of the plaintiff.

The judgment and order are reversed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1386. First Appellate District.—October 26, 1914.]

ANNA BORGFELDT, Respondent, v. F. H. CURRY, Appellant.

FRAUD—TRANSFER TO DEFRAUD CREDITORS—CONSTRUCTION OF SECTIONS 3439 AND 3442, CIVIL CODE.—Sections 3439 and 3442 of the Civil Code should be liberally construed with a view to effect their purpose, which is to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach, or, in other words, to compel a person engaging in business to take the hazards and risks thereof as well as the chances of profit.

ID.—FRAUDULENT TRANSFER—SUFFICIENCY OF EVIDENCE TO SHOW.—In this action to quiet title to certain real property, in which defendant asserts an interest in the property, by virtue of the levy of an attachment thereon, and claims that a transfer of the property to plaintiff by her husband was fraudulent as against him, it is held that the evidence shows the transfer to have been made in contemplation of insolvency, which renders it void under sections 3439 and 3442 of the Civil Code, and that the finding of the trial court that the transfer was not fraudulent as to creditors is not sustained by the evidence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. E. P. Mogan, Judge.

The facts are stated in the opinion of the court.

Charles W. Slack, for Appellant.

Hillyer, Stringham & O'Brien, for Respondent.

RICHARDS, J.—The plaintiff brought this suit to quiet her title to two pieces of real property in San Francisco theretofore conveyed to her in consideration of love and affection by her husband Christoph J. Borgfeldt. F. H. Curry, the defendant, claimed an interest in the property by virtue of the levy of an attachment thereon in an action which he, as assignor of the Banca Svizzera Americana of Locarno, brought upon two joint and several promissory notes theretofore made by said Christoph J. Borgfeldt, and three other persons or corporations, to said bank, it being claimed by said Curry that the transfer of said real property to plaintiff was fraudulent as against the holder and owner of said promissory notes.

In the present action Curry answered, setting up the execution of the notes to the bank, and the assignment thereof to him, and pleaded that the said transfer was made by said Borgfeldt while insolvent or in contemplation of insolvency, and was therefore void as to him and his assignor by virtue of the latter's ownership of the promissory notes hereinbefore mentioned at the time of said transfer.

Upon the trial the court found the facts in accordance with the allegations of the defendant's answer with the exception of the allegation that the transfer was fraudulent as to creditors, and accordingly quieted plaintiff's title to the real property. It denied the defendant's motion for a new trial, and the appeal is from such order and from the judgment.

It is contended by the appellant that the evidence does not support the judgment inasmuch as it shows that said transfer was in fact made by plaintiff's husband while insolvent or in contemplation of insolvency.

The law applicable to the question is found in sections 3439 and 3442 of the Civil Code. Those sections read respectively as follows:

Section 3439. "Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any

person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

Section 3442. "In all cases arising under section twelve hundred and twenty-seven, or under the provisions of this title, except as otherwise provided in section thirty-four hundred and forty, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

(We need not consider sections 1227 and 3440 referred to in the last quoted section, as it is not claimed that they have any bearing upon the question before us.)

These sections, in common with the remainder of the code, should be liberally construed with a view to effecting their purpose. That purpose undoubtedly is to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach, or, in other words, to compel a person engaging in business to take the hazards and risks thereof as well as the chances for profit. If misfortune should overtake him he must face it himself, and not attempt to saddle it on to those who have extended him credit and trusted in his commercial integrity.

In the case at bar the transfer of the property involved was made about three weeks after the great earthquake and fire which occurred in San Francisco on April 18, 1906. At the time of the catastrophe Borgfeldt was engaged in a grocery and retail and wholesale liquor business with a brother as partner, and in addition owned an interest in another business. Both of these businesses were entirely wiped out by the fire, and the customers widely dispersed. The books of the grocery and liquor concern showed accounts payable amounting to ten thousand dollars, and accounts receivable amounting to about nine thousand dollars. It subsequently turned out that the firm collected ninety per cent of these accounts, and also collected a certain amount of insurance; but it is a matter of common knowledge that at the time in question retail merchants in San Francisco whose businesses were located in the burned area did not expect to be able to collect any such

percentage of their accounts, to say nothing regarding the uncertainty of collecting fire losses. For three months after the disaster Borgfeldt had no income, and on the day before the transfer embarked in a new business, the future of which in the unsettled condition of San Francisco neither he nor any one else could predict. Of the two promissory notes above referred to one became due three days after the date of the transfer by Borgfeldt to his wife, and the other eighteen days after said date. The financial condition of his cosigners of the promissory notes was also badly affected by the San Francisco disaster. Every fair inference arising from the testimony as to Borgfeldt's circumstances and financial prospects at the time characterizes the transfer of this real property as one made to save it from the almost certain claims of creditors. We have, moreover, his own admission to the following effect: "The real reason why this transfer was made to my wife was this, that a year or so before the fire I began to go into this mining proposition; I stuck in \$6,000 first; then I put in another \$2,500; and my wife thought it would be better, if I go to work and put all my money in the mining, and she gets nothing for herself, so it was agreed then that I turn the property over to her, and then when this fire came along *and all mine was gone—if the property had been burned out that would have been all gone—so for that reason the transfer was made.*"

That the object of the transfer was to save the property from the claims of creditors rather than to make an absolute gift of it to the plaintiff, may also be legitimately inferred from the fact that six months after the transfer the plaintiff borrowed upon the security of the property the sum of five thousand dollars, which was placed in the business enterprise above mentioned in which her husband had embarked, stock in the concern however being taken in the plaintiff's name.

The principal argument in the briefs of both appellant and respondent is addressed to the question as to whether at the time of the transfer Borgfeldt was actually solvent or insolvent. Appellant constructs from the testimony a table of assets and liabilities, which he contends show Borgfeldt to be insolvent. Respondent takes the same table, and contends that it proves the contrary. The difference between them arises from the item of one thousand dollars, previously referred to as having been put into a new business on the day

preceding the transfer, the appellant contending that this sum should not be regarded as assets, and the respondent contending that it should, and that so regarding it, the assets of Borgfeldt were superior to his liabilities by the sum of about three hundred dollars. In the view we take of the case, however, it matters not whether this sum is included in Borgfeldt's assets or not. Admitting that by a small margin he may be shown to have been solvent, it still remains patent from the evidence that the transfer was made in contemplation of insolvency, and as such, is equally within the terms of the sections of the code cited.

For the reasons stated the finding of the trial court is not supported by the evidence. The judgment is therefore reversed and the court directed to enter a judgment for the defendant for his costs.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 24, 1914.

[Crim. No. 263. Third Appellate District.—October 27, 1914.]

THE PEOPLE, Respondent, v. ORVILLE TAGGART, Appellant.

CRIMINAL LAW—RAPE—INSUFFICIENT RECORD.—LACK OF ERROR.—On this appeal from a judgment of conviction of the crime of rape, it is held that no error appears from the fragmentary record, which consists merely of the minute entries of the trial kept by the clerk and the judgment of conviction.

APPEAL from a judgment of the Superior Court of Del Norte County. John L. Childs, Judge.

The facts are stated in the opinion of the court.

E. M. Frost, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

THE COURT.—Defendant was convicted by a jury of the crime of rape upon one May Bartol, at the time under the age of consent, and was sentenced to imprisonment for the term of five years. It appears from a fragmentary record, sent up to this court, that the verdict was rendered on November 12, 1913, and, upon the motion of defendant's attorney, sentence was postponed from time to time until December 8, 1913. The record of that day reads: "Defendant and attorney in court. Defendant informs court he has no further use for an attorney. E. M. Frost, attorney, makes address to court and retires from case." Passing of sentence was postponed from time to time thereafter until February 24, 1914. It appears that on that day defendant withdrew his motion for a new trial and his plea of not guilty and entered a plea of guilty. Thereupon, the court passed sentence upon him.

We find in the record what purports to be a notice of appeal from the judgment of February 24, 1914, signed "E. M. Frost, attorney for defendant, and Henry L. Ford of counsel for defendant," to which is attached an affidavit of service upon the district attorney by mail and marked "Filed March 6, 1914, W. L. Nichols, Clerk."

No transcript of the phonographic report of the trial has been sent up. There is nothing before the court for review, if it be admitted that an appeal was properly taken, except the minute entries of the trial kept by the clerk and the judgment of conviction.

No error appearing, the judgment is affirmed.

[Crim. No. 264. Third Appellate District.—October 27, 1914.]

THE PEOPLE, Respondent, v. LEO MANDAL, Appellant.

CRIMINAL LAW—PIMPING—LACK OF ERROR.—On this appeal it is held that the defendant was properly charged with the offense of "pimping," and that the evidence was sufficient, and that no prejudicial error was committed.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order refusing a new trial. N. D. Arnot, Judge presiding.

The facts are stated in the opinion of the court.

Martin I. Welsh, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones,
Deputy Attorney-General, for Respondent.

BURNETT, J.—On this appeal we have not been favored with any argument, oral or written. Nevertheless, we have examined the record and we find that defendant was properly charged with the offense designated in the statute as “pimping,” that sufficient evidence of his guilt was received and that no prejudicial error was committed during the trial. The judgment and order are therefore affirmed.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 268. Third Appellate District.—October 27, 1914.]

THE PEOPLE, Respondent, v. ANTON DABNER, Appellant.

CRIMINAL LAW—LEWD ACT ON THE BODY OF A CHILD—SUFFICIENCY OF INDICTMENT—SECTION 288, PENAL CODE.—An indictment which charges that the defendant, on a certain date, and at a certain place, “did then and there willfully, unlawfully and feloniously commit a lewd and lascivious act upon and with the body, and certain parts thereof, of one Crystal Davidson, a female child under the age of fourteen years, to wit, of the age of eight years, by the said Anton Dabner then and there inserting and placing his hands up under the clothes and through and inside of the drawers of said Crystal Davidson, with intent then and there of arousing, appealing to and gratifying the lust, passion and sexual desires of him, the said Anton Dabner,” sufficiently charges the crime defined by section 288 of the Penal Code.

Id.—CONSTRUCTION OF STATUTE.—Section 288 of the Penal Code provides for the punishment of any lewd or lascivious act willfully and lewdly committed upon or with the body, or any member thereof, of a child with the intent of arousing or gratifying the lust or sexual desires of either the perpetrator or his victim, and it is not necessary to charge that the accused touched the naked body, or some part of the body, in fondling or manipulating the person of the child.

APPEAL from a judgment of the Superior Court of Napa County and from an order refusing a new trial. Henry C. Gesford, Judge.

The facts are stated in the opinion of the court.

E. S. Bell, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

CHIPMAN, P. J.—The defendant was convicted by a jury upon an amended indictment in which it was charged that, on or about October 15, 1913, at the county of Napa, he “did then and there willfully, unlawfully and feloniously commit a certain lewd and lascivious act upon and with the body, and certain parts thereof, of one Crystal Davidson, a female child under the age of fourteen years, to wit, of the age of eight years, by the said Anton Dabner then and there inserting and placing his hands up under the clothes and through and inside of the drawers of said Crystal Davidson, with intent then and there of arousing, appealing to and gratifying the lust, passion and sexual desires of him, the said Anton Dabner, contrary,” etc.

The crime charged is defined by section 288 of the Penal Code, which reads: “Any person who shall willfully and lewdly commit any lewd or lascivious act other than the acts constituting other crimes provided for in part two of this code upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with intent of arousing, appealing to, or gratifying the lust or passion or sexual desires of such person or of such child, shall be guilty,” etc.

The only point made in defendant’s brief is “that the act described does not constitute a lewd and lascivious act under the provisions of section 288 of the Penal Code; that that act could only be committed upon or with the body, or some part or member thereof, of a child under the age of fourteen years. There is no allegation in the indictment that the defendant herein ever placed his hands upon or in any way violated or touched the body, or any part or member thereof, of the said Crystal Davidson. It is not even charged that the clothes and the drawers mentioned in said indictment were upon the person of the said Crystal Davidson.”

Furthermore, it is claimed that defendant did not waive this infirmity in the indictment by failure to demur to the indictment for the reason, as is claimed, that where the indictment fails to state a public offense the failure to demur, specially or otherwise, cannot be deemed a waiver of an objection based upon such ground. Citing *People v. Grinnell*, 9 Cal. App. 239, [98 Pac. 681]; *People v. Smith*, 103 Cal. 563, [37 Pac. 516].)

There was evidence sufficient to justify the jury in finding that defendant did in fact place one of his hands under the clothing of the child and through an opening in her drawers to a point of her person which we need not designate while at the same time hugging and kissing her. The act occurred while the child was riding with him in a cart at his solicitation, he having picked her up on the way home from a country schoolhouse. There was also evidence that when he lifted her out of the cart he did so in an unseemly manner and asked her to go with him behind a nearby tree or some bushes. She refused and he then kissed her, gave her ten cents and she went on her way home and, shortly after reaching home, made complaint to her mother.

In his argument, at the hearing, defendant's counsel contended that the crime contemplated by the statute was not sufficiently charged if it fell short of alleging that the accused touched the naked body or some part of the body in fondling or manipulating the person of the child; and that by "inserting and placing his hands up under the clothes and through the inside of the drawers of said Crystal Davidson with the intent," etc., was insufficient to charge the crime. We cannot agree with this view of the law. The statute punishes any lewd or lascivious act willfully and lewdly committed upon or with the body, or any member thereof, of a child with intent of arousing or gratifying the lust or sexual desires of either the perpetrator or his victim. It needs no argument to show that what is here alleged might well import the criminal intention mentioned in the statute, even if, what seems almost a physical impossibility, in doing the alleged act defendant did not touch the naked body of the child. It is easily conceivable that there may be lewd and lascivious acts with the body of a child importing the intent contemplated by the statute where the hands of the perpetrator do not touch the flesh. Acts may be committed with the clothed body

which may be lewd and lascivious and be committed with intent to gratify or arouse sexual desires.

We think the indictment was sufficient to charge a crime under section 288 of the Penal Code.

It would be a reproach to the law to hold that a person may, with the intent charged, do to a child what is here alleged against defendant and not be guilty of violating this statute.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

[Crim. No. 235. Third Appellate District.—October 27, 1914.]

THE PEOPLE, Respondent, v. F. GALLI, Appellant.

CRIMINAL LAW—SALE OF ALCOHOLIC LIQUORS IN "NO-LICENSE" TERRITORY—JUDGMENT AFFIRMED.—On this appeal from a judgment of conviction upon an information charging defendant with selling alcoholic liquors in "no-license" territory, there being no appearance by the defendant after the filing of the transcript of the phonographic report of the trial, the judgment is ordered affirmed.

APPEAL from a judgment of the Superior Court of Humboldt County. George D. Murray, Judge.

The facts are stated in the opinion of the court.

E. W. Wilson, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

THE COURT.—Defendant was convicted at his trial by a jury upon an information charging him with the crime of selling alcoholic liquors in "no-license" territory in the county of Humboldt and was sentenced to pay a fine of four hundred dollars, in default of which he be imprisoned in the county jail of said county for the term of one day for each two dollars of said fine.

The judgment was entered on June 9, 1913. Notice of appeal was duly given and demand to have the phonographic report of the trial written. Such transcript was written and was filed in this court on June 27, 1913, since which time no further steps have been taken by defendant in the prosecution of his appeal. The attorney-general, on the call of the calendar, moved that the cause be submitted on the record. There was no appearance by defendant.

The judgment is affirmed.

[Civ. No. 1310. Third Appellate District.—October 27, 1914.]

COLUSA AND HAMILTON RAILROAD CO. (a Corporation), Respondent, v. CHARLES H. GLENN et al., Appellants.

CONDEMNATION OF LAND—RIGHT OF WAY—NEW TRIAL—ORDER GRANTING—CONFLICTING EVIDENCE—DISCRETION OF COURT.—When the evidence is conflicting, the granting or refusing of a new trial rests peculiarly in the discretion of the trial court, and the appellate court will interfere only in cases of a plain abuse of such discretion, and the party alleging error must show the abuse of discretion. The same rule applies to condemnation proceedings as to other civil actions.

ID.—CONFLICTING EVIDENCE—LACK OF ABUSE OF DISCRETION.—In this action to condemn certain land for a right of way, it is held that the evidence was irreconcilably conflicting, and that there was nothing to indicate that the court abused its discretion in granting the motion for a new trial.

ID.—CONSTRUCTION OF RAILROAD—PROBABLE DAMAGES BY FLOOD WATERS—EXPERT TESTIMONY.—In an action to condemn land for a right of way for a railroad, it is proper to allow expert testimony to the effect that the market value of plaintiff's land will be greatly depreciated by the fact that the railroad, as it is intended to be constructed, will hold back flood waters and thereby cause damage to said land.

ID.—MEASURE OF DAMAGES.—In such a case the rule of damages is the difference between the value of the land immediately before and after the taking of the right of way, the real question in such cases being how much the market value of the property has been diminished by taking the right of way therefrom. In determining and fixing such damages, all matters and conditions which may reasonably be expected to follow the location and operation of the road and effect the value of the land should be considered.

APPEAL from an order of the Superior Court of Glenn County granting a new trial. William M. Finch, Judge.

The facts are stated in the opinion of the court.

Ben J. Geis, and Duard F. Geis, for Appellants.

Frank Freeman, for Respondent.

BURNETT, J.—The action was to condemn a right of way one hundred feet wide and comprising altogether 12.13 acres of land. The jury found that the value of the said strip was the sum of two hundred and fifty dollars per acre at the time of the issuance of the summons, or a total of \$3,032.50; that the damages to the larger tract of which said strip formed a part by reason of its severance and the construction of the railroad was the sum of forty-one thousand four hundred dollars; and that the cost of the necessary fences would be the sum of one thousand nine hundred dollars, making a total award of \$46,332.50. Thereafter findings of fact, conclusions of law and a preliminary order for condemnation were duly signed and filed by the trial court. In due time plaintiff gave notice of its intention to move for a new trial on all the statutory grounds and the court made the following order; "Plaintiff having heretofore moved for a new trial in this cause, and the same having been argued, submitted and taken under advisement by the court, and the court having considered the matter and being fully advised in the premises, hereby grants said motion for a new trial, and it is so ordered on the ground that the amount awarded defendants by the jury as damages is excessive." From this order the appeal is taken.

It would be an utter waste of time and effort to consider the appeal at length as the case comes clearly within the well-established principle that when evidence is conflicting the granting or refusing of a new trial rests peculiarly in the discretion of the court below and that the appellate court will interfere only in case of a plain abuse of such discretion and, furthermore, that the party alleging error must show the abuse of discretion. (*Hall v. Bark "Emily Banning,"* 33 Cal. 525.) The same rule applies to condemnation proceed-

ings as to other civil actions. (*San Diego Land Co. v. Neale*, 88 Cal. 50, [11 L. R. A. 604, 25 Pac. 977].)

The evidence here was essentially, emphatically, and unreconcilably conflicting, as shown by the testimony set forth in respondent's brief, with the repetition of which we deem it unnecessary to burden the record. There is nothing to indicate that in the order complained of the court abused its discretion. On the contrary, we must assume that the court acted in good faith upon the conviction that the verdict was unjust, and it must be said that an inspection of the record discloses legal justification for that conviction.

One of the important controverted questions of the trial, to which brief attention will be given, related to probable damages from flood waters that might be held on the severed tract by reason of the construction of plaintiff's proposed railroad. The consideration was suggested by this interrogatory: "Would the construction of the railroad as proposed and testified to, cause flood waters of the Sacramento River, when they reach the proposed constructed railroad, to hold the waters back upon the lands of Charles Glenn that would not be held if the railroad wasn't there, or wasn't built in accordance with the proposed plan as testified to?" This was followed by a question whether thereby damage would be caused to the land of said Glenn not sought to be taken. The court at first sustained an objection to each of these questions but afterward changed its ruling and held that such evidence is admissible. The court stated its reasons for so holding, citing many decisions in support of its opinion. We may refer to only one of these cases in which the rule is undoubtedly correctly stated. In *Blunck v. Chicago & N. W. Ry. Co.*, 142 Iowa, 146, [120 N. W. 737], the supreme court of Iowa said: "The rule of damages is the difference between the value of the land immediately before and after the taking of the right of way. . . . The real question in such cases being how much has the market value of the property been diminished by taking the right of way therefrom, it is manifest that in determining and fixing such damages all matters and conditions which may reasonably be expected to follow the location and operation of the road and affect the value of the land should be considered." Many illustrations of the rule are given in that and other opinions but we need not reproduce them. If there is a reasonable probability that the

construction of plaintiff's railroad as contemplated will augment the damage to the land caused by flood waters, of course, this is a circumstance to be considered by the jury in arriving at a proper award. Whether there is such reasonable probability is a matter of opinion based upon certain physical facts which are detailed by some of the witnesses.

From plaintiff's showing the inference would follow that no probable damage would ensue from this source and that the market value of the land would not be affected by this circumstance. For instance, H. M. Mitchell testified: "When the flood waters reach the railroad embankment it would not check its flow. It would deflect the water to the south and change its direction, but it would not hold the waters back at all. The channel, as it now is on the Glenn place, would not be changed. If there was twice as much water held back on the Glenn place east of the railroad right of way, by reason of the construction of the railroad, the channel could not be narrowed and it would not take any longer for the water to pass off the Glenn place than it does now, for under that assumption, it would have four times the velocity and pass off in the same length of time as now. The trestles that we have located on this road will take care of all the water that comes on the Glenn place, no matter where it comes from."

There was expert evidence, however, on behalf of defendant to the effect that the railroad as intended to be constructed would hold back the water on something like four hundred and eighty acres of land. On this assumption the opinion was expressed that the market value would be greatly depreciated. We are not prepared to say that there was no basis for such opinion.

The matter is, of course, somewhat speculative, depending upon various contingencies, but if thereby the market value of the land is diminished defendant has the right to make proof of it, and there is no available method by which to show this fact except through the opinion of competent witnesses. The inquiry should, of course, be very carefully conducted and none but qualified witnesses should be allowed to express an opinion for the assistance of the jury. This character of evidence is generally unsatisfactory and often misleading, but as to this point no different proof seems possible.

We think a new trial may be safely intrusted to the discretion of the learned judge of the lower court without any further suggestions.

The order is affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1255. Third Appellate District.—October 30, 1914.]

ELVIN ADAMS, Respondent, v. C. GERIG, Appellant.

ACCOUNT STATED—ABSENCE OF FRAUD—FAIRNESS OF TRANSACTION—FINDINGS SUPPORTED BY EVIDENCE.—In this action upon an account stated it is held, on an appeal from the judgment, that the findings of the court as to the absence of fraud and the fairness of the transaction culminating in the statement of account, are abundantly supported.

Id.—EVIDENCE OF OMISSIONS AND ERRORS ADMISSIBLE.—In an action upon an account stated it is proper for the court to allow evidence of omissions and errors therein. In such a case the whole account need not be opened and readjusted, but the mistake can be corrected and the rights of the parties readjusted as to such mistake, and the parties are bound by the balance of the account.

APPEAL from a judgment of the Superior Court of Lassen County. H. D. Burroughs, Judge.

The facts are stated in the opinion of the court.

R. M. Rankin, for Appellant.

Pardee & Pardee, for Respondent.

BURNETT, J.—An examination of the record shows justification for the following statement of facts made by respondent: "Plaintiff and his wife were hired by the defendant to work upon the latter's farm in Lassen County, the plaintiff to do general farm work, and his wife to do housework. They commenced work under this employment April 8, 1909, and continued, with some intervals of lost time, until September 21, 1911. The agreed wages for Mrs. Adams were fifteen dollars per month, or fifty cents per day, at all times except during haying and harvesting, when she was to have

thirty dollars per month, or one dollar per day. There is some conflict as to plaintiff's ordinary wages; he says the agreement was forty dollars per month while defendant asserts the wages were to be thirty-five dollars per month. But there is no dispute that his pay was to be two dollars per day during haying and two dollars and fifty cents per day during harvest. In October, 1911, after the termination of the employment, the parties attempted to settle at the defendant's farm; but they could not agree as to the state of their accounts, and at the suggestion of the defendant they went, on October 23, 1911, to Bieber's store at McArthur, in Shasta County, to have R. E. Dunlap, the manager of that store, help them to settle. So they submitted their various memoranda to Mr. Dunlap, and he prepared for them a statement of the account, showing a balance due the plaintiff of \$1,192.73. Dunlap was entirely disinterested, and did not influence, or attempt to influence, either party. Defendant signed the statement of account, certifying that he owed the plaintiff the balance therein stated, his signature being by mark and witnessed by Dunlap." There was a clerical error of twenty-five dollars in the account and some items were inadvertently omitted from the settlement. These items are mentioned in the findings and were taken into account in arriving at the amount of judgment given to plaintiff. "After the statement of the account, and before the plaintiff sued, the sum of \$426.40 was paid on account by the defendant. The plaintiff commenced his action August 9, 1912, basing it on the account stated." Defendant by his answer denied that the account was stated and alleged that plaintiff and Dunlap presented the account to defendant and requested him to sign it and, upon his objection, urged and persuaded him to sign it and falsely and fraudulently represented to him that it was true and correct. It is further alleged that the account is not correct; "that mistakes were made in the computation of wages of plaintiff and his wife; that it does not contain all the cash or merchandise received by plaintiff from defendant, and that many items of account were omitted therefrom." The cause was tried upon the issues as thus presented, the fullest opportunity being afforded to show the inaccuracy of said account or that fraud or improper influence was practiced, and the court gave judgment to plaintiff for \$723.12 and found that "the account was stated as

alleged by plaintiff; that it was fairly stated and no fraud was perpetrated and no false representations were made by plaintiff or any one acting for him; but that all mistakes were mutual."

The appeal is from the judgment. The finding of the court as to the absence of fraud and the fairness of the transaction culminating in the said statement of account is abundantly supported. Indeed, as claimed by respondent, the testimony of the defendant himself would be sufficient for that purpose and the account of the settlement and of the surrounding circumstances given by Mr. Dunlap, an entirely disinterested witness, could lead the court to no different conclusion.

The only other question of moment is whether it was proper for the court upon an action for account stated to allow evidence of omissions and errors therein and to find in favor of plaintiff in accordance with the developed facts. As to this, under the decisions, there can be no kind of doubt.

The rule is, as stated in *Branger v. Chevalier*, 9 Cal. 353, as follows: "Accounts stated may be opened, and the whole account taken *de novo*, for gross mistake in some cases; but this can only be done when the gross error affects all the items of the transaction. When the clear mistake affects only a portion of the items of the stated account, it will be permitted to stand except so far as it can be impugned by the party alleging the error. And when the party who seeks to go behind the stated account, goes into particulars, and specifies the items improperly charged or omitted, he is confined to those items, and the remainder of the account must stand."

In *Carpenter v. Kent*, 101 N. Y. 591, [5 N. E. 787], the same question was considered and the court said: "We do not think that the defendants had the right to have the whole account opened, but that they were bound by the account actually settled, unless they could show some mistake or fraud in the settlement. Where an account has thus been adjusted by the parties, if any mistake is subsequently discovered, the whole account need not be opened and readjusted, but the mistake can be corrected and the rights of the parties readjusted as to such mistake."

It is useless to multiply quotations, but, as sustaining the same doctrine, we may mention the following additional

authorities; *Tuggle v. Minor*, 76 Cal. 100, [18 Pac. 131]; *Conville v. Shook*, 144 N. Y. 688, [39 N. E. 405]; Story's Equity Jurisprudence, 13th ed., secs. 523, to 525; 1 Ruling Case Law, p. 220.

Under the issues as made by the complaint and answer the court very properly allowed, therefore, said account to be surcharged and falsified and directed judgment in favor of plaintiff for \$723.12 instead of \$766.40, as claimed.

The findings of fact are supported, they are within the issues and they in turn support the judgment and we have discovered no reason for interfering with the conclusion of the lower court. The judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1817. Third Appellate District.—October 30, 1914.]

ASBESTOS MANUFACTURING AND SUPPLY COMPANY (a Corporation), Respondent, v. AMERICAN BONDING COMPANY OF BALTIMORE et al., Appellants.

BUILDING CONTRACT—PUBLIC WORK—ACTION ON BOND—TIME FOR COMMENCEMENT—CONSTRUCTION OF AMENDMENT OF 1911.—The amendment of 1911 (Stats. 1911, p. 1422) to the statute passed March 27, 1897, requiring the giving of a bond to secure payment of lien claims upon public work, applies to a contract which was completed before the passage of said amendment; and where the contract was completed prior to February 26, 1912, but the claim was not filed until April 12, 1912, and a suit on the bond was begun July 18, 1912, the claim was filed and the suit begun in time, as said amendment extended the time of filing the claim from thirty days to ninety days and the time for bringing suit on the bond from ninety days to six months.

ID.—ENLARGEMENT OF TIME—OBLIGATION OF CONTRACT NOT IMPAIRED.—

In such a case, where the enlargement of the time for filing the claim and beginning the suit was made before the time had arrived in which either of said steps could be taken under the old statute, the extension of time operated merely as a modification of the remedy and did not impair the obligation of the contract.

ID.—SUFFICIENCY OF BOND.—It is held in this action that the bond sued on, which seems to follow closely the language of the statute, and

specifies that it was given as required by the act of the legislature, entitled "An act to secure the payment of claims of materialmen, mechanics or laborers employed by contractors upon state, municipal or other public work, approved March 27th, 1897," sufficiently conforms to the requirements of the statute.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. John E. Richards, Judge presiding at trial. J. E. Crothers, Judge refusing new trial.

The facts are stated in the opinion of the court.

Lilienthal, McKinstry & Raymond, for American Bonding Company of Baltimore, Appellant.

David L. Levy, for J. W. Rapple and Lennig-Rapple Engineering Company, Appellants.

Edwin H. Williams, for Respondent.

BURNETT, J.—The action is against appellant American Bonding Company of Baltimore as surety upon a bond given by the Lennig-Rapple Engineering Company for the doing of public work in the city and county of San Francisco. The bond was given pursuant to a statute enacted in 1897 requiring that the person seeking relief under the bond shall file with the board of public works a verified statement of his claim within thirty days from the time such work is completed, and providing, further, that suit may be filed by such claimant within ninety days after the filing of such claim. The work here was completed prior to February 26, 1912, but the claim was not filed until April 12, 1912, and the suit was begun July 18, 1912. But, while the statute in force at the time of the execution of the contract required the filing of the claim and the commencement of the action as stated above, in 1911 (Stats. 1911, p. 1422) the said act was amended and said respective periods were extended, and it is conceded by said appellant "that if the act of 1911 is operative in this case, the claim was properly filed and the suit commenced within proper time." It is insisted, however, that "the amendatory act of 1911 should not be construed as being retroactive and the provisions of the act in force when the bond was executed should be considered the sole criterion."

Respondent, though, calls attention to several decisions directly in point that support the view taken by the trial court. Appellant has not seen fit to notice any of these cases although it is stated that they were relied upon in the trial court. We content ourselves with specific reference to only three of those cited.

In *Bear Lake v. Garland*, 164 U. S. 1, [41 L. Ed. 327, 17 Sup. Ct. Rep. 7], the question involved an amendment providing an extension of time for the foreclosure of a mechanic's lien, and Mr. Justice Peckham, delivering the opinion of the court, said: "The mere enlargement of the time in which to commence the action, at least in a case where the time had not yet arrived in which to file any statement of the plaintiff's claim for a lien, does not affect any right or remedy provided for in the old act. The right, as that term is used in the statute, consisted of the right of sale of the property in order, if necessary, to obtain payment of the money due the contractor. The remedy consisted of the taking of certain proceedings by which this sale was to be accomplished. Prior to the arrival of the time when one of these steps was to be taken an alteration of the statute by which the time to take that step might be enlarged was not an alteration of the right or of the remedy, as those terms are used in the statute, nor did it in any way affect either; it was simply an alteration of the mere procedure in the course of an employment of a remedy, the remedy itself remaining untouched or unaffected by such alteration. In this case such an enlargement of time to commence an action was given before the time had arrived in which the action could have been commenced under the old statute." It was therefore held that the new act applied to plaintiff's case. In this instance it may likewise be said that the enlargement of the time for filing the claim and beginning the action was made before the time had arrived in which either of said steps could be taken under the old statute, and in principle the two cases are not distinguishable.

A later case is *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276, [57 L. Ed. 221, 33 Sup. Ct. Rep. 17], wherein the action was brought on a bond, under a Minnesota statute, providing that the parties executing the bond shall be liable, with the condition that the claimant serve notice within ninety days after he finishes his work. After the

bond had been executed and delivered, the statute was amended so that time for service of the notice was extended. The claimant served a notice which was late according to the time limit provided in the original statute, but was within the time limit as extended by the amendment. The United States supreme court held that the extension of time operated merely as a modification of the remedy and did not impair the obligation of the contract, the court saying: "The decision must turn, we think, on the familiar distinction between a law which enlarges, abridges or modifies the obligation of a contract, and a law which merely modifies the remedy by changing the time or the method in which the remedy shall be pursued, without substantial interference with the obligation of the contract itself. . . . In the case now before us we agree with the Minnesota supreme court in the view that a requirement of a preliminary notice to the obligors as a condition precedent of an action upon the bond affects the remedy and not the substantive agreement of the parties, and although the statute as it stood when the bond was given must be treated as if written into the contract, it still imposed a condition not upon the obligation, but only upon the remedy for breach of the obligation. Therefore the subsequent statute effected merely a change in the remedy without substantial modification of the obligation of the contract."

The case of *Kerckhoff-Cuzner Mill Co. v. Olmstead*, 85 Cal. 80, [24 Pac. 648], involved the construction of a statute shortening the time within which a mechanic's lien could be filed. The court said: "We do not think that the amendment, when applied to the case in hand, is retroactive in effect. It is true, it *shortened* the time within which the respondent would otherwise have had to file its claim and thus seek its remedy. But the authorities are numerous to the effect that a change of remedy, or in the time within which it must be sought, does not impair the obligation of a contract, provided an adequate and available remedy be left."

We think the foregoing cases properly state the rule and are decisive of the controversy here.

There is no more merit in the contention of appellant that the bond does not conform to the requirement of the statute. It seems to follow closely the language of the statute and specifies that the bond is given as required by an act of the legislature entitled "An act to secure the payment of the

claims of materialmen, mechanics or laborers employed by contractors upon state, municipal or other public work, approved March 27, 1897."

The foregoing are the only points made by appellant and, as they seem untenable, the judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 265. Third Appellate District.—October 31, 1914.]

THE PEOPLE, Respondent, v. ROBERT DRENNAN,
Appellant.

CRIMINAL LAW—RAPE—CRIME AGAINST FEMALE UNDER AGE OF CONSENT—VERDICT JUSTIFIED.—In this prosecution for rape, alleged to have been committed upon a female under the age of eighteen years, it is held that, from a careful examination of the testimony, the instructions and the rulings of the court on questions involving the admissibility and nonadmissibility of certain testimony, it appears that the defendant was in all respects given a fair and legal trial and that the verdict was justified.

Id.—LACK OF CONSENT OF PROSECUTRIX—CONVICTION OF ASSAULT WITH INTENT TO COMMIT RAPE—SUFFICIENCY OF EVIDENCE.—In such a case, where, although the prosecutrix was but a little over eight years of age, she protested against the conduct of the defendant which formed the basis of the charge in the information, from such testimony the jury were justified in finding that the defendant's acts were against the consent of the prosecutrix, and such finding, together with a finding that the defendant actually attempted to have sexual intercourse with the child, if, indeed, he did not succeed in doing so, is a sufficient predicate of the conclusion reached by the jury that the crime committed by the accused was that of an assault with intent to commit rape.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order refusing a new trial. N. D. Arnot, Judge presiding.

The facts are stated in the opinion of the court.

J. M. Inman, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant was charged by information filed in the superior court of Sacramento County with the crime of rape upon a female under the age of eighteen years, and upon a trial for said offense was convicted of the crime of assault with intent to commit rape. He appeals from the judgment and the order denying him a new trial.

The record before us consists entirely of the clerk's transcript embracing the minutes of the court, the instructions, verdict, etc., and a transcript of the testimony. No briefs on behalf of either the appellant or the respondent have been filed, nor was the cause orally argued.

We have, however, taken the pains to examine the testimony, the instructions, and the rulings of the court upon questions involving the admissibility and nonadmissibility of certain testimony, to the allowance of which objections were made and exceptions reserved, and our conclusion is that the defendant was in all respects given a fair and legal trial, and that the verdict appears to be justified.

The record discloses that, although the prosecutrix was but a little over eight years of age, she protested against the conduct of the defendant which formed the basis of the charge in the information. From this testimony the jury were justified in finding that the defendant's acts were against the consent of the prosecutrix, and such finding, together with the finding that the defendant actually attempted to have sexual intercourse with the child, if, indeed, he did not succeed in doing so, is a sufficient predicate of the conclusion reached by the jury that the crime committed by the accused was that of an assault with intent to commit rape. (*People v. Akens*, 25 Cal. App. 373, [143 Pac. 795].)

The judgment and order are affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 262. Third Appellate District.—October 31, 1914.]

THE PEOPLE, Respondent, v. OTTO CREITSER,
Appellant.

CRIMINAL LAW—RAPE—CRIME AGAINST FEMALE UNDER THE AGE OF CONSENT.—On an appeal from a judgment of conviction and from an order denying a new trial in a prosecution for rape alleged to have been committed upon a female under the age of consent, where there has been no record of the testimony or any briefs filed in the appellate court, and no appearance on behalf of the defendant when the cause was regularly called on the calendar, the court is justified in ordering the appeals dismissed.

ID.—LACK OF ERROR.—It is held in this case that, from a careful examination of the record, nothing therein can be discovered which would warrant sustaining any of the appeals.

ID.—PRONOUNCEMENT OF JUDGMENT—WHEN WITHIN TIME.—In this case the trial was called on November 12, 1913, and the same was then proceeded with, but before completing the jury panel the defendant withdrew his plea of not guilty theretofore interposed and entered a plea of guilty to the charge alleged in the information, and the court thereupon fixed November 15, 1913, as the time for pronouncing the judgment of sentence; thereafter the court continued the matter of sentencing the defendant from time to time until the period elapsing between the day upon which he pleaded guilty and the day upon which sentence was finally pronounced comprehended over one hundred days; subsequently the defendant withdrew his plea of guilty and asked that his case be set down for trial; the matter of fixing a date for the trial was continued until February 24, 1914, at which time the defendant again entered a plea of guilty to the information, and declared to the court that he desired to dispense with any further services of his attorney, and waived time for the passing of sentence, whereupon the court immediately pronounced judgment. *Held*, that while the court in the first instance exceeded its authority by postponing the matter of passing sentence beyond the time limited by section 1191 of the Penal Code, that point cannot be urged by the defendant in view of his subsequent withdrawal of his plea of guilty and second entry of such plea and waiver of time for pronouncing judgment.

APPEAL from a judgment of the Superior Court of Del Norte County and from an order refusing a new trial, and all orders made after judgment. John L. Childs, Judge.

The facts are stated in the opinion of the court.

E. M. Frost, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant pleaded guilty, in the superior court of Del Norte County, to an information charging him with the crime of rape upon a female under the age of consent, May Bartol by name—a name by no means unfamiliar to this court, its possessor having been the victim of similar mistreatment to that charged against the defendant by four other parties, who were convicted of the offense and who unavailingly appealed their cases to this court. (See *People v. Bartol*, 24 Cal. App. 659, [142 Pac. 510]; *People v. Hoosier*, 24 Cal. App. 746, [142 Pac. 514]; *People v. Horn*, *ante*, p. 583, [144 Pac. 641]; *People v. Taggart*, *ante*, p. 628, [144 Pac. 1197], the opinion in which was filed in this court on October 27, 1914.)

The present appeal is from the judgment and the order denying the defendant a new trial, “and from each and every order of said superior court made after pronouncing judgment in the above entitled cause.”

There has been no record of the testimony filed in this court, nor are there any briefs on file herein. There was no appearance in behalf of the defendant when the cause was regularly called on the calendar at the last regular term of the court, and the attorney-general, therefore, submitted the case on the record, such as it is, now before us. Under these circumstances, we would be justified in ordering the appeals herein dismissed. (Rule V, Supreme Court, 160 Cal. xlv, [119 Pac. x]; *People v. Perry*, 16 Cal. App. 772, [117 Pac. 1036].) But the record is brief and, therefore, while not deemed necessary, we have gone to the trouble of examining it carefully, and have discovered nothing therein which would warrant us in sustaining any of the appeals, if, indeed, it may be said that any has been properly taken.

It appears that the defendant's case was called for trial on November 12, 1913, and the same was then proceeded with. Before completing the jury panel the defendant withdrew his plea of not guilty theretofore interposed and entered a plea of guilty to the charge alleged in the information. The court thereupon fixed Saturday, November 15, 1913, as the time for

pronouncing the judgment of sentence. Thereafter the court continued the matter of sentencing the defendant from time to time until the period elapsing between the day upon which he pleaded guilty and the day upon which sentence was finally pronounced comprehended over one hundred days.

It appears from the affidavit of counsel for the defendant that, after entering a plea of guilty and after the several postponements by the court of the time for passing sentence, as above explained, the defendant withdrew his plea of guilty and asked that his case be set down for trial. The matter of fixing a date for the trial of the case was continued until February 24, 1914, at which time the defendant again entered a plea of guilty to the information, and declared to the court that he desired to dispense with any further services of his attorney. The defendant, upon entering his plea of guilty at said time, waived time for the passing of sentence, and the court thereupon and immediately pronounced its judgment.

Thus we have presented all the important facts disclosed by the record of this case as filed in this court.

Although, as stated, no brief was filed or oral argument presented on behalf of the defendant, we may assume that the point upon which the defendant claims the right to a reversal is that (so he might claim) the sentence having been pronounced long after the time within which the law provides that such act shall be performed (Pen. Code, sec. 1191), the court lost the right or the legal authority to pronounce sentence or judgment at all. That section provides that after a plea or verdict of guilty, the court must appoint a time for pronouncing judgment, "which must not be less than two, nor more than five days after the verdict or plea of guilty; provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment; and provided further, that the court may extend the time not more than twenty days in any case where the question of probation is considered, in accordance with section twelve hundred and three of this code. If, in the opinion of the court, there is a reasonable ground for believing a defendant insane, the court may extend the time of pronouncing sentence until the question of insanity has been heard and determined, as provided in chapter six, title ten, part two of this code."

Referring to said section, the supreme court, in *Rankin v. Superior Court*, 157 Cal. 189, 191, [106 Pac. 718], says: "The effect of this section is that the court has no authority to fix the time for pronouncing judgment for a day later than five days after the verdict; that, if a motion for a new trial or in arrest of judgment is made, the court may, for the purpose of deciding the same, extend the time for ten days, and that, where the question of probation is considered, the court may, for that purpose, extend the time twenty days. These two provisions for extension of time are not cumulative and the latest date to which the court is authorized to extend the time for rendering judgment, where present insanity is not involved, is a day not more than twenty-five days after the date of the return of the verdict." (See, also, *People v. Flavin*, 21 Cal. App. 244, 246, [131 Pac. 321].)

But, assuming that there is a legal appeal here, it is readily obvious that, while the court in the first instance exceeded its authority by postponing the matter of passing sentence beyond the time expressly limited by the statute, that point cannot now be urged by the defendant, since it appears, as we have shown, that he withdrew his plea of guilty after the matter of pronouncing judgment had been postponed from one date to another until the statutory period had been passed, and that, after so withdrawing said plea, he again entered a plea of guilty, waived time for the pronouncing of judgment, and the court thereupon and at once pronounced its judgment of sentence. The court, therefore, in passing sentence was obviously within the time limit prescribed by the statute for pronouncing judgment upon what seems to have been at that time the only plea to the information before it.

The judgment and all the orders appealed from are affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1279. Third Appellate District.—November 4, 1914.]

In the Matter of the Petition of WILLIAM P. KELLY and EVA P. KELLY to have Mary Louise Donahoo, a Minor Child, Declared an Abandoned Child; M. J. DONAHOO et al., Appellants; W. P. KELLY et al., Respondents.

PARENT AND CHILD—PROCEEDING TO DECLARE CHILD ABANDONED—INSUFFICIENCY OF EVIDENCE TO SHOW.—In a proceeding to have it determined that a minor child has been abandoned by its parents, where the evidence, without dispute, showed that, fearful lest the delicate physical condition of the mother was such that she could not properly nourish her two infants born at the same time, the parents arranged with the sister of the father to take the custody and care of one of the infants, a girl; that the father, during the period that the child was with his sister and until the latter became ill and unable to bestow proper care upon the baby, paid the custodian of said child for the service of caring for it; that, after the sister became ill, the father sent to the persons who had taken charge of the child the sum of \$30.00 which, while intended to be used for the benefit of the sick woman, was doubtless in part or perhaps in full payment of her services in caring for the infant; that the general tenor of the language of letters written by both the father and mother of the child to its custodians, after the latter had voluntarily taken the custody of the infant, clearly indicated an intention on the part of the parents to reimburse them for their services in looking after and attending to the welfare of the child; and that, as a matter of fact, the father agreed to compensate the custodians for their services to the child whenever he found himself financially able to do so, the court was not legally justified in declaring the minor to be an abandoned child within the meaning of section 224 of the Civil Code, providing that "any child deserted by both parents or left in the care or custody of another by its parent or parents," without any agreement or provision for its support, for a period of one year, is deemed to be an abandoned child.

ID.—SEVERING RELATION BETWEEN PARENT AND CHILD—STATUTE TO BE STRICTLY CONSTRUED.—A statute which authorizes a court upon a showing of the existence of certain designated facts or conditions, to make a decree or an order whereby the natural relation between parent and child is destroyed, must be strictly construed, and is, therefore, to be applied in those cases only in which the precise facts or conditions prescribed by such statute are shown to exist.

ID.—ADOPTION—SECTION 224 CIVIL CODE TO BE STRICTLY CONSTRUED.—While the effect of an adjudication that a minor is an abandoned child, under the terms of section 224 of the Civil Code, is not to directly sever the relation of parent and child, still, since the result

of such adjudication under said section is to enable a third party to adopt such child without first procuring the consent of its parents, thus practically depriving the parents of any voice in the matter of an adoption, in case a proceeding for that purpose be inaugurated, that section is also to be subjected to a strict construction when its application is invoked.

ID.—FAILURE OF PARENTS TO SUPPORT CHILD—ABANDONMENT NOT SHOWN BY.—The mere failure of the parents of a minor child, in the custody and under the care of a third party, to contribute, while it is in such custody and care, to the support and maintenance of such child for a period of one year, does not itself constitute an abandonment of the minor within the purview of section 224 of the Civil Code. To constitute abandonment under said section of the code, it must appear by clear and indubitable evidence that there has been by the parents a giving up or total desertion of the minor. In other words, there must be shown an absolute relinquishment of the custody and control of the minor and thus the laying aside by the parents of all care for it.

ID.—ABANDONMENT—QUESTION OF INTENTION—EVIDENCE MUST BE CLEAR. Abandonment is a question of intention, which must be shown by a clear, unequivocal, and decisive act of the party—an act done that shows a determination not to have the benefit of the right to which he is entitled.

ID.—PROMISE OF FATHER TO COMPENSATE CUSTODIAN OF CHILD—AGREEMENT FOR SUPPORT—SECTION 224, CIVIL CODE.—In such a case the promise by the father of the child that he would compensate, when able to do so, the custodian of the child for taking care of and supporting it, constitutes the "agreement or provision for its support," contemplated by section 224 of the Civil Code, and the fact that the father failed to keep said promise can prove nothing but a violation of the agreement.

ID.—ATTACHMENT OF CHILD AND CUSTODIAN FOR EACH OTHER—BETTER CIRCUMSTANCES OF CUSTODIAN THAN OF PARENTS NOT MATERIAL.—The circumstance that the child and its custodians have formed a strong attachment for each other and that the custodians are better circumstanced than the parents for caring for the child, while perhaps more or less important in disposing of a guardianship proceeding, cannot enter into the determination of the question of adoption against the consent of the parents, or of a proceeding which, if sustained, would render it legally unnecessary to consult the desires or wishes of the parents in a proceeding looking to the adoption of their minor child by another.

APPEAL from a judgment of the Superior Court of Tuolumne County. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

Rowan Hardin, for Appellants.

Crittenden Hampton, for Respondents.

HART, J.—This proceeding, as its title readily indicates, was instituted by the above-named petitioners, in the superior court of Tuolumne County, for the purpose of securing the judgment of said court that one Mary Louise Donahoo, a minor, is an abandoned child within the purview of section 224 of the Civil Code, the ultimate object of the judicial declaration so sought herein being to enable said petitioners to adopt said minor.

The petition alleges facts sufficient to state a case of abandonment under the section of the Civil Code above mentioned and the same was answered and contested by the parents of the minor.

At the hearing of the proceeding, evidence for and against the claims of the petition was taken, the court found that said child had been abandoned by its parents within the contemplation of said section 224 of the Civil Code, and rendered and caused to be entered judgment in accord with said finding.

This appeal is prosecuted by the parents of said minor from said judgment.

The single question submitted on this appeal is whether the said minor is an abandoned child within the meaning and intent of the code section above referred to.

Among other provisions, said section contains the following: "Any child deserted by both parents or left in the care and custody of another by its parent or parents, without any agreement or provision for its support, for the period of one year, is deemed to be an abandoned child within the meaning of this section . . . " It is claimed and the petition avers that the parents of the minor concerned here left said minor in the care and custody of the petitioners, without having made any agreement or provision for its support, for a period of more than one year.

The salient facts upon which this controversy is to be determined are practically undisputed and may be briefly stated as follows:

The minor involved in this controversy is one of twins—a boy and a girl—born to the contestants, Mr. and Mrs. M. J. Donahoo, on the twenty-second day of January, 1909. The

mother of the twins was, after the birth thereof, left in such delicate health that she became apprehensive that she could not properly take care of and maintain both the infants, and the parents, therefore, came to the conclusion that the infants would fare the better by placing one in the custody and under the control of a sister of the father of the children, a Mrs. Emma Swanson, then residing in the city of Sonora. To this end, and some three weeks after the birth of the infants, the father and mother completed arrangements whereby Mrs. Swanson took the custody and assumed the responsibility of caring for and maintaining the girl baby.

Shortly after the infant was given into the custody of Mrs. Swanson, and while yet in such custody, the Donahoos departed for Los Angeles, where they took up their residence.

The infant remained with Mrs. Swanson until the month of June, 1912—a period of over three years—when the latter was taken so seriously ill as to have suffered mental derangement to a degree which required her removal to and, for a brief period, incarceration in the state hospital for the insane at Stockton.

The petitioners were near neighbors of Mrs. Swanson and so became aware of her illness immediately upon the happening thereof. They gave her much attention and did all that lay within their power to make her as comfortable as she could be made under the circumstances. They took charge of and ministered to the wants and necessities of the baby girl during Mrs. Swanson's illness and prior to her removal to the asylum. They communicated the fact of Mrs. Swanson's illness to the Donahoos, and informed them that she was greatly embarrassed financially. Upon receiving that information the father of the child forwarded to the petitioners, for the use and benefit of Mrs. Swanson, the sum of thirty dollars.

After Mrs. Swanson had been committed and taken to the asylum, the petitioner, William P. Kelly, addressed a letter to the parents of the child in which he declared that he and his wife had become greatly attached to the baby, that they had no children of their own and that they desired to adopt the infant. To that proposition no response was made by the Donahoos, so far as the record discloses.

The petitioners retained custody of the child after Mrs. Swanson was sent to the asylum and for over a year cared for and supported her. During that period a number of letters

was written by the Donahoos to the petitioners concerning Mrs. Swanson and the child. In one of said letters the father of the baby explained that he had just suffered the loss of several hundred dollars through the failure of a concern for which he had been working, but that he was then working for another company and that, "as soon as I get a pay day, I will send you more money, and as often as I do get one." He further stated in said letter that "if anything should happen to sister (referring to Mrs. Swanson) we will arrange about Louise," referring to the baby. The other letters above referred to as having been written to the Kellys by the Donahoos disclose a commendable degree of parental solicitude for the child, and, while they contained no direct statements indicative of an intention on the part of the Donahoos to compensate the petitioners for caring for and supporting the baby, the general tenor of their language does not support the conclusion that the parents intended to abandon or relinquish their right to its custody.

It appears that, a few months after being committed to the asylum, Mrs. Swanson sufficiently recovered her physical and mental health to justify her discharge from that institution, and so, in the month of December, 1912, she left the asylum and went to Fresno, where she remained until July, 1913, when, at the request of the Donahoos, she went to Sonora for the purpose of regaining possession of the child. Mrs. Swanson testified in part as follows: "As soon as I regained my health (after she was released from the asylum), I was in communication with Mrs. Kelly all the time relative to the welfare of the little girl. In June, 1913, arrangements were made with Mr. Donahoo to send me to Sonora to get the child, as shown by the letter from Mr. and Mrs. Donahoo to me, dated the 16th day of June and the 23d day of June, 1913. I came to Sonora about the 10th day of July for the purpose of getting the little girl, acting in behalf of Mr. and Mrs. Donahoo. I did not know that any proceedings had been commenced at that time to have the child declared an abandoned child. I was informed of such proceedings by Mr. Kelly after I reached Sonora. From my knowledge of the conditions surrounding Mr. and Mrs. Donahoo in this matter I know neither of the parents had any intention at any time of abandoning the little girl. At one time I tried to get the consent of the father and mother to adopt the little girl, but

they refused to consider the matter at all. When I came to Sonora in July, 1913, Mr. Kelly told me that Mr. Donahoo had promised to pay for the care of the child, but that he had failed to keep his promise. I have recollections during lucid moments of my sickness in July, 1912, of Mrs. Kelly telling me that she and her husband would care for the child and that Mr. Donahoo had promised to pay for the care of the child. At the time I was taken sick, Mr. Donahoo was living in Los Angeles. After I regained my health, I knew Mr. Donahoo's financial condition during the latter part of the year 1912 and the early part of the year 1913, and knew that he was out of work a portion of the time and that he had sickness in the family and was unable to pay his bills. The sum of money I had in my possession at the time I was taken sick was money sent me by Mr. Donahoo. . . . Mr. Donahoo sent me money for the support of the child and whenever I requested it he sent me money for my support."

M. J. Donahoo testified that, during the time the child was with his sister, Mrs. Swanson, he paid for its support and maintenance and at times paid for the support of Mrs. Swanson. He said that, prior to the receipt from William P. Kelly of a telegram on June 3, 1912, telling him of the illness of Mrs. Swanson, he was unaware of the latter's physical and mental condition. At that time his wife was ill in Los Angeles and he was unable to collect money which was due him and for these reasons he did not go to Sonora to take possession of his child and to render succor to his sister. "I knew," he continued, "the child was in good hands with Mr. and Mrs. Kelly and was satisfied that I could make settlement with them afterwards for the trouble in caring for the child, when I had means to do so. Prior to the writing of the letter of July 7th, the petitioners' Exhibit A, I wrote to Mr. Kelly asking him to contribute for the child and that I would contribute to him for it as soon as I was able. The money which I mentioned being sent in the letter marked petitioners' Exhibit B was intended to apply toward the support of the child, and in compliance with my promise to reimburse Mr. Kelly for his trouble and expense in caring for the child. At no time did I have any intention of abandoning said child, and it was my intention to come and get the child and reimburse Mr. Kelly as soon as my finances would permit. . . . I am in a position now to pay Mr. Kelly a reasonable sum per

month to reimburse him for his trouble in caring and providing for said child and I am desirous of obtaining the child and caring and providing for her. As soon as these proceedings were commenced I tendered money to Mr. Kelly, being the sum of \$10.00, as testified to by Mr. Kelly herein."

Both Mr. and Mrs. Kelly testified that when Mrs. Swanson was taken ill, as above explained, they found that the child had been very much neglected; that she was weak and emaciated for want of sufficient food; that she was without proper raiment and unclean of body. They declared that they had never been remunerated by her parents for the care and support they had given the child for a period of over one year, and that no provision had been at any time made by the parents for the child's care and maintenance.

The foregoing constitutes a statement in substance of all the facts and some of the testimony upon which the judgment appealed from was founded. As stated, and as must readily be observed from an examination of the above statement, there is in reality no dispute as to the facts, and the sole question is: Was the court legally justified in declaring and adjudging upon said facts that the minor involved here was an abandoned child within the meaning of section 224 of the Civil Code?

We cannot persuade ourselves that the conclusion of the learned trial judge is sustainable.

In the first place, it is to be remarked that a statute which authorizes, upon a showing of the existence of certain designated facts or conditions, a court to make a decree or an order whereby the natural relation between parent and child is destroyed, must be strictly construed and is, therefore, to be applied in those cases only in which the precise facts or conditions prescribed by such statute are shown to exist. As is said in the case of *Matter of Cozza*, 163 Cal. 514, 522, [Ann. Cas. 1914A, 214, 126 Pac. 161]: "The adoption of a child was a proceeding unknown to the common law. The transfer of the natural right of parents to their children was against its policy and repugnant to its principles. It had its origin in the civil law and exists in this state only by virtue of the statute which, as above stated, expressly prescribes the conditions under which adoption may be legally effected. Consent lies at the foundation of statutes of adoption, and under our law this consent is made absolutely essential to confer jurisdiction on the superior court to make an order of adoption, un-

less the conditions or exceptions exist specially provided by the statute itself and which render such consent of the parents unnecessary. Unless such consent is given, or, for the exceptional causes expressly enumerated is expressly dispensed with, the court has no jurisdiction in the matter."

While the effect of an adjudication that a minor is an abandoned child under the terms of section 224 of the Civil Code is not to directly sever the relation of parent and child, still, since the result of such adjudication under said section is to enable a third party to adopt such child without first procuring the consent of its parents, thus practically depriving the parents of any voice in the matter of an adoption, in case a proceeding for that purpose be inaugurated, that section is also to be subjected to a strict construction when its application is invoked.

In the second place, we are persuaded to say that the mere failure of the parents of a minor child, in the custody and under the care of a third party, to contribute, while it is in such custody and care, to the support and maintenance of such child for a period of one year, does not itself constitute an abandonment of the minor within the purview of said section of the code. If the rule were otherwise—that is, if an adjudication of abandonment could legally be predicated on the mere failure by the parents to support their minor children—the result, in innumerable instances, would be to work a manifest wrong upon parents. It is not difficult to conceive of circumstances wholly beyond the control of parents having the deepest affection for their children which would render it impossible for them to support their children or care for them in a proper way. It would indeed, be a harsh rule which would, under such circumstances, authorize a judicial determination by which the natural right of the parents to the custody and control of their children would be forever destroyed.

To constitute an abandonment under said section of the code it must appear by clear and indubitable evidence that there has been by the parents a giving up or total desertion of the minor. In other words, there must be shown an absolute relinquishment of the custody and control of the minor and thus the laying aside by the parents all care for it. (*Crabb on Synonyms*; *Pidge v. Pidge*, 44 Mass. (3 Metc.) 257, 265; *Sikes v. State* (Tex.), 28 S. W. 688, 689; *Nugent v. Powell*, 4 Wyo.

173, [62 Am. St. Rep. 17, 20 L. R. A. 199, 33 Pac. 23]; *Dikes v. Miller*, 24 Tex. 417, 424; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, [39 Pac. 1054, 1058].) And abandonment is a question of intention, which must be shown by a clear, unequivocal, and decisive act of the party—an act done that shows a determination not to have the benefit of the right to which he is entitled. (*Breedlove v. Stump*, 11 Tenn. 257, 276.)

We have been unable to perceive in the evidence adduced at the hearing of this proceeding a single fact which may fairly be said to indicate an intention in the parents of the child concerned here to desert said minor or relinquish their natural right to her custody, care, and control. To the contrary, according to our interpretation of the proofs, the parents not only manifested a desire to perpetuate all the consequences of the natural relation subsisting between them and the infant, but displayed commendable anxiety for its welfare.

The evidence, without dispute, shows that, fearful lest the delicate physical condition of the mother was such that she could not properly nourish the two infants born at the same time to her, the parents arranged with the sister of the father to take custody and care of the infant girl; that the father, during the period that the child was with his sister and until the latter became ill and unable to bestow proper care upon the baby, paid the custodian of said child for the service of caring for it; that, after Mrs. Swanson became ill, the father sent to the petitioners the sum of thirty dollars which, while intended to be used for the benefit of the sick woman, was doubtless in part or perhaps in full payment of her services in caring for the infant; that the general tenor of the language of the letters from both the father and mother of the child to the petitioners, after the latter had voluntarily taken the custody of the infant, clearly indicated an intention on the part of the parents to reimburse the petitioners for their services in looking after and attending to the welfare of the child; that, as a matter of fact, the father agreed to compensate the petitioners for their services to the child whenever he found himself financially able to do so.

Under the facts as thus recapitulated, and which, as stated, stand uncontradicted, it is difficult to conceive how an adjudication that the minor in controversy is an abandoned child,

or was abandoned by its parents, within the meaning of the language of section 224 of the Civil Code, can be upheld.

The promise by the father of the child that he would compensate, when able to do so, the petitioners for taking care of and supporting it, constituted the "agreement or provision for its support" contemplated by said section, and the fact that the father failed to keep said promise can prove nothing but a violation of the agreement.

It may be true that the child, now approaching her sixth year, and having been with the Kellys for over a year, has formed a strong attachment for the petitioners, as they no doubt have for the child. It may also be true that the Kellys are better circumstanced than are her parents for bestowing upon her proper care. But, while these considerations might, perhaps, be of more or less importance in disposing of a guardianship proceeding, they cannot, obviously, enter into the determination of the question of adoption against the consent of the parents or of a proceeding, like the present, which, if sustained, would render it legally unnecessary to consult the desires or wishes of the parents in a proceeding looking to the adoption of their minor children by another.

We conclude that the learned trial judge erred in the conclusion crystallized in the judgment from which this appeal is prosecuted, and said judgment is, therefore, reversed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 526. First Appellate District.—November 4, 1914.]

THE PEOPLE, Respondent, v. E. J. EDDARDS, Appellant.

CRIMINAL LAW—OBTAINING MONEY BY FALSE PRETENSES—SALE OF MICA MINE—SUFFICIENCY OF INFORMATION.—In a prosecution for obtaining money under false pretenses the information states facts sufficient to constitute a public offense where it alleges that the defendant together with another person, "devising and intending by unlawful ways and means and by false and fraudulent pretenses and representations to obtain and get into their custody and possession the personal property of Frank M. Ferguson, with intent to cheat and defraud said Frank M. Ferguson of the same, did then and there willfully, unlawfully, knowingly, designedly, falsely, fraud-

ulently, and feloniously, pretend and represent to said Frank M. Ferguson that they, the said E. J. Eddards and George Gilbert, had sold to the Standard Oil Company, a corporation, a mica mine for a large sum of money, and that said large sum of money was then and there in the hands of and in the possession of one Asa V. Mendenhall, and that a portion of said large sum of money, to wit, the sum of \$15,000, in lawful money of the United States, in the hands and in the possession of said Asa V. Mendenhall, was to be paid by said Asa V. Mendenhall to one J. S. Lord; that said \$15,000 in lawful money of the United States was the share and interest of said J. S. Lord received from the sale of said mica mine to the Standard Oil Company, a corporation; that adjoining said mica mine there were other lands containing mica, and that they, the said E. J. Eddards and George Gilbert, had then and there a contract with said Asa V. Mendenhall whereby the said Asa V. Mendenhall would, for a consideration of ten per cent of the sale price, induce the Standard Oil Company, a corporation, to purchase from them, the said E. J. Eddards and George Gilbert, ten mica claims for the sum of \$550,000 in lawful money of the United States when they, the said E. J. Eddards and George Gilbert, would locate and properly stake off said ten mica claims and obtain deeds on the said mica claims," it being further alleged that each of said representations was false and fraudulent and known to be so by the defendant, and were made to induce the defrauded party to pay to defendant and his associate the sum of two hundred dollars, and that the defrauded party believed said representations to be true and acted thereupon.

ID.—SUFFICIENCY OF INFORMATION—MEANS OF FRAUD—WHEN OBJECTIONS WAIVED BY FAILURE TO DEMUR.—In such a case the information is sufficient both in the respect that it follows the language of the statute, and also in that it sets forth with particularity the details and successive steps of the fraud; and an objection to it on the ground that there is no reference as to the means by which the alleged fraud was consummated is one which is aimed at mere uncertainty, which should have been taken advantage of by a special demurrer, and in the absence of such demurrer, the objection, if otherwise tenable, was waived.

ID.—INSUFFICIENCY OF SINGLE REPRESENTATION—WHEN REVERSAL NOT WARRANTED BY.—In such a case, while one of the several representations averred to have been made by the defendant might, if standing alone, be regarded as insufficient to base a prosecution upon, this fact is not sufficient to warrant a reversal of the case, where the other representations are sufficient.

ID.—INSTRUCTIONS—REFUSAL OF INSTRUCTION NOT ERROR WHEN COVERED BY OTHERS.—In such a case there is no error in refusing an instruction proffered by the defense, however correct in point of law, where it is sufficiently covered by other instructions given by the court.

ID.—EVIDENCE—ADMISSIBILITY OF CONVERSATIONS OF DEFENDANT WITH THIRD PARTY—TELEGRAM FROM DEFENDANT TO ASSOCIATE.—In such a case there was no error in permitting the party, who, it was charged, the defendant represented held the purchase money for the mica mine, to testify in respect to conversations between himself and the defendant regarding dealings between them closely allied to the transaction with the complaining witness; such conversations being admissible, first, as part and proof of the very dealings between the defendant and the alleged victim, set forth in the information; and, second, as evidence of a similar transaction with the alleged holder of the purchase money tending to shed light upon the motive of the defendant in making his representations to the complaining witness; nor was the admission in evidence of a telegram for money sent by the codefendant, with appellant, to the wife of another party, who was one of the associates of appellant in the mica enterprise.

ID.—SUFFICIENCY OF EVIDENCE.—In such a case, where the evidence is conflicting upon practically every important issue of fact involved in the trial, the appellate court, under the well established rule, is prohibited from considering the sufficiency of the evidence to sustain the verdict.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. William S. Wells, Judge.

The facts are stated in the opinion of the court.

Marguerite Ogden, and Holcomb & Kempley, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

RICHARDS, J.—This is an appeal from a verdict and judgment of conviction, whereby the defendant was found guilty of the crime of obtaining money under false pretenses, and from an order denying the defendant's motion for a new trial.

The first alleged error of the trial court consists in the denial of the motion of the defendant in arrest of judgment, and for a dismissal of the action upon the ground that the facts stated in the information did not constitute a public offense.

The information charges that the defendant together with one George Gilbert, "devising and intending by unlawful ways and means and by false and fraudulent pretenses and representations to obtain and get into their custody and pos-

session the personal property of Frank M. Ferguson, with intent to cheat and defraud said Frank M. Ferguson of the same, did then and there willfully, unlawfully, knowingly, and designedly, falsely, fraudulently and feloniously pretend and represent to the said Frank M. Ferguson that they, the said E. J. Eddards and George Gilbert, had sold to the Standard Oil Company, a corporation, a mica mine for a large sum of money, and that said large sum of money was then and there in the hands of and in the possession of one Asa V. Mendenhall, and that a portion of said large sum of money, to wit, the sum of \$15,000.00 in lawful money of the United States, in the hands and in the possession of said Asa V. Mendenhall, was to be paid by said Asa V. Mendenhall to one J. S. Lord; that said \$15,000.00 in lawful money of the United States was the share and interest of said J. S. Lord received from the sale of said mica mine to the Standard Oil Company, a corporation; that adjoining said mica mine there were other lands containing mica, and that they, the said E. J. Eddards and George Gilbert, had then and there a contract with said Asa V. Mendenhall whereby the said Asa V. Mendenhall would, for a consideration of 10% of the sale price, induce the Standard Oil Company, a corporation, to purchase from them, the said E. J. Eddards and Geo. Gilbert, ten mica claims for the sum of \$550,000.00 in lawful money of the United States when they, the said E. J. Eddards and Geo. Gilbert would locate and properly stake off said ten mica claims and obtain deeds on said mica claims." It is then set forth specifically that each and all of the foregoing representations were utterly false and fraudulent, and were known so to be by the said E. J. Eddards and Geo. Gilbert and each of them, and were made by them and each of them for the purpose of inducing said Frank M. Ferguson to pay over and deliver to them the sum of two hundred dollars; and that the said Frank M. Ferguson, believing each and all of said false and fraudulent representations and pretenses to be true, and being deceived thereby, did deliver and pay over to said defendants the sum of two hundred dollars, which said sum was received and obtained by them and each of them with the intent then and there to cheat and defraud the said Frank M. Ferguson out of the same, and that they and each of them did thereby and then and there willfully, unlawfully, fraud-

ulently, designedly, and feloniously cheat and defraud said Frank M. Ferguson out of said money.

We think this information sufficient both in the respect that it follows the language of the statute, and also in that it sets forth with particularity the details and successive steps of the fraud. It is contended by the defendant that there is no reference in the information as to the means by which the alleged fraud was consummated. This objection, however, is one which is aimed at the mere uncertainty of the information by reason of its insufficient amplification so as to set forth the entire transaction between the defendants and the defrauded person, and is in the nature of a special demurrer. This being so, it should have been made in the form of a demurrer to the information *in limine*, but the record shows that no such pleading was presented. We think, therefore, that this objection, if otherwise tenable, was waived by the failure of the defendants to demur to the information.

The next contention of the appellant is that one of the several representations made by the defendants to the defrauded person was inadequate to form the basis of a criminal pretense sufficient to satisfy the statute. But this was only one of the representations averred to have been made by the defendant; and while standing alone it might not be regarded as sufficiently tangible to base a prosecution upon, still we think that read with the others, especially when viewed in the light of the entire testimony, the insufficiency of this single item of the charge would not be adequate to work a reversal of the case.

The appellant's next contention is that the court erred in its refusal to give to the jury the fifth instruction asked by his counsel. We think that this instruction, however correct in point of law, was sufficiently covered by the other instructions given by the court.

As to the alleged errors of law arising out of the rulings of the court during the trial, we do not find that any of these are of sufficient importance to warrant discussion in detail. The principal one of these has reference to the action of the court in permitting the witness Mendenhall to testify in respect to conversations between himself and the appellant regarding dealings between them closely allied to the transaction with the complaining witness. These conversations were admitted for two reasons: 1. As part and proof of the very dealings

between the appellant and Ferguson set forth in the information; and, 2. As evidence of a similar transaction with Mendenhall tending to shed light upon the motive of the appellant in the making of his representations to Ferguson. Both of these were sufficient reasons for the admission of this testimony. There is also a ruling of the court admitting in evidence a certain telegram for money sent by George Gilbert, the codefendant, with appellant, to the wife of one J. O. Brown, who was one of the associates of appellant in the mica enterprise. The purpose of producing this telegram and its admission does not seem very clear; but it is too immaterial an episode in the progress of the case to justify a reversal, even if it were conceded to be an error.

The main argument of counsel for the appellant upon the hearing of this appeal and in her briefs was devoted to the plea that the evidence in the cause did not sufficiently show the defendant to be guilty of the offense charged in the information. This branch of the case was very clearly, logically, and plausibly presented; and were this the trial court, or were we sitting in the attitude of jurors, we may not say how far it would have availed to set this defendant free; but since the evidence in the cause was conflicting upon practically every important issue of fact involved in the trial, we may not, under the well-established rule of this court, give ear to an argument predicated upon such substantial conflict in the testimony as the record discloses here.

We find no sufficient error of law in the record to justify a reversal of the case. The judgment and order are affirmed.

Lennon, P. J. and Kerrigan, J., concurred.

[Civ. No. 1295. Third Appellate District.—November 5, 1914.]

GEORGE S. MONTGOMERY, Plaintiff and Respondent, v.
WALTER E. DORN, and **CHARLES A. FITCH**, De-
fendants and Respondents; **A. J. RANKIN**, Defendant
and Appellant.

**CONTRACTS—AGREEMENT TO PAY NOTE OF THIRD PARTY—EXECUTION BY
AGENT—PLEADING AND FINDINGS—WHEN NO VARIANCE BETWEEN.—**

Where a written agreement is executed by an agent in his own name for his undisclosed principal, in which he promises, in consideration of the transfer to him of certain corporation stock, to pay certain claims of third parties, among them the promissory note in suit, in an action on the agreement there is no variance between an allegation of the complaint that both the agent and the principal expressly agreed in writing, for a valuable consideration moving to each of them, to pay said promissory note, and a finding that the principal alone made such promise, it appearing from the evidence, and the court finding, that the agent was in fact acting for his undisclosed principal.

ID.—PLEADING—PARTIES—PRINCIPAL AND AGENT—JOINDER.—The general rule is that, where a contract is made by an agent within the scope of his employment, both the agent and the undisclosed principal, when discovered, are liable on the contract and may be joined as defendants.

ID.—PLEADING—AGENCY NEED NOT BE ALLEGED.—It is not necessary in such a case to aver the fact of agency, it being sufficient to charge the act as that of the principal, without disclosing the fact of the agency; and where the proof is that such acts were done or knowledge obtained by the principal's authorized agent there is no variance.

ID.—EVIDENCE—ADMISSIBILITY OF NOTE AND CONTRACT.—In such a case evidence offered by the plaintiff as to the execution and delivery of the note, as to the pledging of shares of corporation stock, and as to the contract for the sale of certain of said shares, is admissible, although the appellant's name did not appear on the note or in the contract, where the testimony later connected the appellant with the transaction.

ID.—EVIDENCE—RECEIPT OF BENEFITS—ADMISSIBILITY OF TESTIMONY OF AGENT.—In such a case it was competent to show who received the benefits of the transaction, and also to show by the agent for whom he was acting.

ID.—EVIDENCE—AGENT COMPETENT TO TESTIFY TO AGENCY.—While the statements or admissions of one not as a witness, that in a certain transaction he acted as agent for another, are not competent to prove

the fact of agency, yet if he is called as a witness, his testimony not only that he acted as agent of the party, but as to the fact of agency, where it rests in parol, is as competent as that of any other witness.

ID.—CONNECTION OF APPELLANT WITH TRANSACTION—LIABILITY OF APPELLANT.—In such a case the contention that the liability rested upon a certain company, instead of upon appellant, cannot be sustained, where the agent testified that to the best of his knowledge, appellant was a member of said company and that he represented the company in the negotiations, that appellant was the only person disclosed as principal, that he received the benefits and profits of the contract and that the agent was acting for appellant throughout the transaction and that the latter became the owner of the stock "in pursuance of the contract," and where it further appeared that appellant was a witness in his own behalf and neither in his answer, nor in his testimony claimed that said company was a party to the transaction, and the testimony of two other witnesses showed that the transaction was for appellant's individual benefit.

ID.—VALIDITY OF CONTRACT.—In such a case, inasmuch as the agreement was one not required to be in writing, it was not essential that the agent's authority to act should be in writing, and section 2309 of the Civil Code has no application.

ID.—AUTHORITY OF AGENT.—In such a case the claim that the agent's authority being "expressed in general terms" he had no authority "to act in his own name," under section 2322 of the Civil Code, cannot be maintained, where the evidence shows that the principal did not desire to buy the stock in his own name and requested the agent to execute the contract in the latter's name.

ID.—PROMISSORY NOTE—NONPAYMENT—EVIDENCE.—The production of a promissory note showing no indorsement of payment is *prima facie* evidence of nonpayment.

ID.—CONTRACT TO PAY CLAIMS OF THIRD PARTY—RIGHT OF THIRD PARTY TO ENFORCE.—In such a case where the appellant agreed, in consideration of the transfer of certain corporation stock to him, to pay certain claims of third parties, among them the promissory note in suit, his promise is one made for the benefit of said third parties, which may be enforced by the latter.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. N. D. Arnot, Judge presiding.

The facts are stated in the opinion of the court.

Sullivan & Sullivan and Theo. J. Roche, for Appellant.

R. H. Cross, for Respondent, George S. Montgomery.

A. F. St. Sure, and L. W. Lovey, for Respondent, Walter E. Dorn.

CHIPMAN, P. J.—In plaintiff's amended complaint it is alleged that defendant Fitch executed his promissory note to plaintiff, September 26, 1908, for the sum of one thousand three hundred and sixty dollars, payable ninety days after date, with interest after maturity, secured by certain shares of Home Circle Cash Store & Mail Order House, a corporation; that, after the execution of said promissory note and prior to the commencement of the action, defendants Dorn and Rankin "expressly and in writing undertook, agreed and promised the said Chas. A. Fitch, for a good and valuable consideration moving to them, and to each of them, to pay the said promissory note and the whole thereof for the express benefit of plaintiff herein and said undertaking, agreement and promise has at no time been rescinded."

The prayer is for judgment against defendants for one thousand three hundred and sixty dollars, with interest at seven per cent after December 26, 1908, and that said pledged property be sold and the proceeds applied to the payment of said indebtedness and for general relief.

Defendant Rankin interposed a general and special demurrer to the amended complaint which, being overruled, he answered by expressly denying its averments. Defendant Dorn answered and, on information, denied most of the averments of plaintiff's amended complaint and, by way of answer thereto, set forth what he alleged to be the facts in the transaction, to wit: that, on or about September 7, 1909, as agent and attorney of Rankin and not otherwise, he entered into a written agreement (plaintiff's Exhibit 3) to purchase for Rankin from defendant Fitch and one H. McDonald certain shares of said corporation, referred to in plaintiff's complaint, and in consideration of the transfer of said stock by Fitch and McDonald to Rankin, the said Rankin promised and agreed to pay for said shares certain cash to Fitch and to liquidate certain designated claims and among them the said claim of plaintiff; that in pursuance of said contract said shares were transferred to Rankin and Rankin paid to Fitch the amount agreed, to wit, one hundred and fifty dollars, and one other claim, but did not pay certain other claims nor did he pay the said claim of plaintiff; that he, Dorn, acted solely

as agent and attorney of Rankin and so informed defendant Fitch and said McDonald and "that said defendant A. J. Rankin was the principal in said contract and that the defendant, Walter E. Dorn, was but the agent and attorney for said party"; that in pursuance of said contract said Rankin became the sole owner of said stock of said corporation.

The court gave judgment for plaintiff against defendants Fitch and Rankin for the sum of one thousand three hundred and sixty dollars and interest at seven per cent from December 29, 1908, and directed that the said shares be sold and the proceeds applied to the payment of said amount and that the action be dismissed as to defendant Dorn. Defendant Rankin alone appeals from the judgment and from the order denying his motion for a new trial.

Upon sufficient evidence the court found that the averments of the amended complaint were true and that the averments of defendant Rankin's answer were not true. Specifically, and on sufficient evidence, it found that Fitch executed the promissory note as alleged and pledged the said shares as alleged and as testified to by defendant Fitch and that no part of said promissory note has been paid; that the transaction by which defendant Rankin became liable for the payment of said promissory note was substantially as alleged in defendant Dorn's answer and as testified to by him; that Dorn was acting solely as Rankin's agent and attorney and by his direction and with his knowledge and consent and that, pursuant to said written agreement entered into by Dorn, Rankin paid certain of the claims therein agreed by him to be paid but that he did not pay plaintiff's said claim; that Dorn received no profits or benefits from said transaction and that "defendant A. J. Rankin received all the benefits and profits accruing from said contract, and was and is the principal thereunder. That defendant, A. J. Rankin, received valuable and sufficient considerations for the execution of said contract of October 7, 1909, as hereinafter set forth." Finding numbered 7 is as follows: "That defendant A. J. Rankin, after the said execution and delivery of said promissory note, . . . to wit, on or about October 7, 1909, expressly and in writing, undertook, agreed and promised the said Charles A. Fitch for a good and valuable consideration moving to him, to pay the said promissory note owing from said C. A. Fitch to plaintiff and the whole thereof for the express benefit of plaintiff

herein, and said undertaking, agreement and promise has at no time been rescinded."

1. Appellant's first proposition is that there is a fatal variance between paragraph IV of the complaint and the findings thereon,—namely, finding 7. This paragraph stated that Walter E. Dorn and A. J. Rankin "expressly and in writing undertook, agreed and promised the said Charles A. Fitch for a good and valuable consideration moving to them, and to each of them, to pay said promissory note and the whole thereof, for the express benefit of the plaintiff." The claim is that "both Dorn and Rankin undertook in writing to pay said promissory note and that both received consideration therefor, while the findings, based upon the evidence as it was viewed by the court, are that A. J. Rankin alone 'expressly and in writing undertook, agreed and promised' to pay said promissory note." (Citing *People v. Cummings*, 117 Cal. 497, [49 Pac. 576].) In that case the indictment charged that the note was obtained by false pretenses describing the notes as having been executed by one person as maker, but the proofs showed that the note was executed by two persons as joint makers, and the variance was held material. No such case appears here. It was not alleged that Dorn and Rankin jointly executed the agreement and it was not found that Rankin "alone" entered into the agreement, but rather that he, through his agent, Dorn, entered into it.

Dorn was, on the face of the agreement, a principal while in fact he was the agent of the undisclosed principal. "The general rule is that where the contract is made by an agent within the scope of his employment, both the agent and the undisclosed principal, when discovered, are liable on the contract, and may be joined as defendants thereon." (31 Cyc., p. 1624.) It was not necessary to aver the fact of agency, "it being sufficient to charge the act as that of the principal, without disclosing the fact of the agency" (Id., p. 1626); and where "the proof is that such acts were done or knowledge obtained by his authorized agent, there is no variance." (Id., p. 1638.) Rankin was shown by the evidence to have been the undisclosed principal and was properly joined with Dorn as party defendant and as to Rankin a good cause of action was stated, Rankin was, therefore, not prejudiced, whether or not a judgment went against Dorn. (*Allen v. Globe Grain & Milling Co.*, 156 Cal. 286, 291, [104 Pac. 305].)

2. In making his proofs plaintiff introduced testimony as to the execution and delivery of the note; also as to the pledging of the shares of the corporation; also as to the contract for the sale of certain of these shares, to all of which defendant Rankin objected on the ground that his name did not appear on the note or in the contract and that each transaction was *res inter alios acta*. The testimony was relevant when offered as to the other defendants and the testimony later along in the trial fully connected Rankin with the transactions. We discover no error in admitting this or any of the evidence offered. It was competent to show who received the benefits of the transaction and it was competent to show by Dorn for whom he was acting. "While the statements or admissions of one not as a witness, that in a certain transaction he acted as agent for another, are not competent to prove the fact of agency, yet if he is called as a witness, his testimony not only that he acted as the agent of the party, but as to the fact of agency, where it rests in parol, is as competent as that of any other witness." (*McRae v. Argonaut Land & Development Co.*, 6 Cal. Unrep. 145, [54 Pac. 743]; Mechem on Agency, sec. 101.)

3. Some further points are presented on motion for nonsuit which will be briefly noticed. It is claimed that the evidence showed that the contract was the obligation of A. J. Rankin & Company and not that of Rankin. Dorn testified that to the best of his knowledge Rankin was a member of the said company, and that he represented the company in the negotiations. The evidence was that Rankin was the only person disclosed as principal. Dorn testified that Rankin received the benefits and profits of the contract and that he was acting for Rankin throughout the transaction and that Rankin became the owner of the stock "in pursuance of the contract." Rankin was a witness in his own behalf. Neither in his answer nor in his testimony did he claim that his firm was a party to the transaction. The testimony of defendant Fitch as well as that of Dorn shows that the transaction was for Rankin's individual benefit.

Appellant further contends that the contract was invalid because it was an agreement to pay the debt of another and was not signed by Rankin, and that Dorn had no authority in writing to act for Rankin. (Citing Civ. Code, secs. 1624 and 2309.) "The promise of a transferee of property, made in consideration of the transfer, to assume and discharge an

indebtedness of the transferrer to a third person, is obligatory on him although resting in parol." (20 Cyc. 174; *Sacramento Lumber Co. v. Wagner*, 67 Cal. 293, [7 Pac. 705]; *Tevie v. Savage*, 130 Cal. 411, [62 Pac. 611]; *Doe v. Allen*, 1 Cal. App. 560, [82 Pac. 568].) Inasmuch as the agreement was one not required to be in writing, it was not essential that Dorn's authority to act for Rankin should be in writing and section 2309 of the Civil Code has no application.

It is also claimed that Dorn's authority was "expressed in general terms" and hence he had no authority "to act in his own name," citing section 2322 of the Civil Code. Dorn was asked by appellant's attorney to state why he had not presented the contract to Rankin to be signed. He answered: "For the reason that Mr. Rankin did not want to buy the stock in his own name, as he said to me, and he said he didn't want to buy it in his own name for the reason that he being in the grocery business, the creditors of the Home Circle Cash Store were so numerous and it was Mr. Rankin's opinion if they knew he was the purchaser they would insist on being paid in full; and it was his idea that by purchasing it in my name, I would be able to make a settlement with the creditors for a less amount than 100% on the dollar." He testified directly that Rankin requested him, Dorn, to execute the contract in his own name.

4. The production of the promissory note showing no indorsement of payment was *prima facie* evidence of nonpayment. (*Melone v. Ruffino*, 129 Cal. 514, [79 Am. St. Rep. 127, 62 Pac. 93]; *Hurley v. Ryan*, 137 Cal. 461, [70 Pac. 292]; *Stuart v. Lord*, 138 Cal. 672, [72 Pac. 142].)

5. Finally, it is contended that the contract, plaintiff's Exhibit 3, is not the contract contemplated by section 1559 of the Civil Code, which provides as follows: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

Dorn was the party of the second part in the contract and by its terms it was agreed: "That the party of the second part shall assume and pay or liquidate the following claims against the parties of the first part (C. A. Fitch and A. H. McDonald) or either of them, to wit: The claim of A. J. Rankin Company, and his assignee F. B. O'Reilley, for the sum of \$2,600.00 or thereabouts. The claim of Morris Bros. Company for the sum of \$350.00 or thereabouts. The claim

of George S. Montgomery, for the sum of \$1,360.00, or thereabouts, together with interest. Pay to C. A. Fitch between \$100.00 and \$150.00 immediately upon a transfer of all of the stock." There was evidence and the court found that Rankin, in accordance with said contract paid Fitch the sum of \$150.00 and Morris Bros. Company \$350.00, but did not pay plaintiff as by said contract he agreed to do. The contention of appellant is that plaintiff, Montgomery, was to receive under this contract "nothing more than a mere incidental benefit" and that, applying the recognized definition of the word "expressly," the conclusion "is inescapable that the same (the contract) was never intended for the 'express benefit' of plaintiff Montgomery in this action and is therefore not within the provisions of section 1559 of the Civil Code." Cases are cited, of which *Chung Kee v. Davidson*, 73 Cal. 522, [15 Pac. 100], is an example, where the court said: "The general rule applicable to cases of this kind is, that when two persons, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce its agreement with the other." Is this such a case? In our opinion the contract cannot be so construed. The contract reads: "That the parties of the first part (Fitch and McDonald) sell, and the party of second part (Dorn) buys (describing the shares of stock) upon the following terms and conditions, to wit: That the party of the second part shall assume and pay," etc., as quoted above.

In addition to the promise to pay the claims mentioned, Dorn (Rankin) was to give Fitch a position in case Dorn (Rankin) succeeded in reorganizing the corporation whose stock he was buying and Fitch was to receive some of the shares of this new corporation if organized. There is nothing in the contract, however, that gives the slightest ground for the contention that plaintiff's interest in it was merely incidental. The payment of the claims mentioned was the chief consideration for the transfer of the stock, and when we substitute Rankin for Dorn, as the evidence fully warrants our doing, it seems to us very clear that the contract was made "expressly for the benefit" of plaintiff. Dorn testified that in making the sale of the stock Fitch insisted that certain claims against him should be paid, among them the claim

of Montgomery evidenced by the note in suit. Hence the provision in the contract for the payment of this claim. Dorn delivered the contract to Rankin who must be presumed to have known what his obligations were under it. He discharged part of them pursuant to the contract and we can see no reason for holding that he should not discharge the one here involved. Many cases might be cited to show that section 1559 is not confined in its application to the case of a sole or primary beneficiary. (*Washer v. Independent Mining Dev. Co.*, 142 Cal. 702, [76 Pac. 654]; *Bacon v. Davis*, 9 Cal. App. 83, [98 Pac. 71], and *Goff v. Ladd*, 161 Cal. 257, [118 Pac. 792], are among such cases.) The principle here involved is further illustrated in cases such as *Malone v. Crescent City M. & T. Co.*, 77 Cal. 38, [18 Pac. 858]. There defendant agreed to pay a certain amount to a creditor of one Murray who was engaged in running logs for defendant. It was held that an original indebtedness was thus created in favor of the creditor of Murray and that if a contract be for the benefit of a third person, even though he be not cognizant of it when made, the promise, if adopted by him, is deemed to have been made to him, and he may sue thereon, though the whole consideration moved to the promisor from the original promisee; and it is no objection to such action that the original promisee might also sue upon the promise. This principle was applied where the grantee of a mortgagor assumed the payment of the mortgage debt. (*Williams v. Naftzger*, 103 Cal. 438, [37 Pac. 411]; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, [40 Pac. 27]. See, also, *Meyer v. Parsons*, 129 Cal. 653, [62 Pac. 216]; *Tevis v. Savage*, 130 Cal. 411, [62 Pac. 611].)

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1414. First Appellate District.—November 5, 1914.]

WILLIAM WADE et al., Respondents, v. CITY AND COUNTY BANK (a Corporation), Appellant.

MECHANICS' LIENS—DEPOSIT OF CHECK WITH BANK TO PAY—TRUST FOR CLAIMANTS NOT CREATED.—Where an owner of property delivered her check to a bank in which she was a depositor, which check was afterwards certified by the bank, with instructions to pay it to a certain building company with which she had made a contract to construct a building upon her property, upon the production of satisfactory releases of liens and notices to withhold, executed by various parties who performed labor upon and furnished material for the construction of the building, and about three years after the deposit of the check, the construction company served notice upon the bank that it no longer had any interest in the check, whereupon the bank applied the amount of money represented by the check upon an indebtedness of the depositor to it under its banker's lien, under the circumstances, no trust in the funds was created in favor of the lien claimants, and the bank was justified in applying the amount of the check upon the indebtedness of its depositor.

ID.—NO EQUITABLE ASSIGNMENT OR ESTOPPEL—LACK OF PRIVACY.—In such a case the transaction neither creates a trust in favor of the lien claimants, or an equitable assignment; nor is there anything that could in any manner be construed as creating an estoppel in their favor, where the record does not show that they knew anything of it. The entire transaction was simply a means adopted by the owner of the building of setting aside money with which to pay her contractor.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

Jesse H. Steinhart, for Appellant.

Arthur H. Barendt, and F. W. Sawyer, for Respondents.

RICHARDS, J.—This action was brought by plaintiffs to obtain judgment against defendant for funds claimed to be held in trust by defendant for the benefit of plaintiffs.

Plaintiffs had judgment, from which and from an order denying a new trial defendant appeals. The facts upon which the alleged trust arose are as follows:

In March, 1907, Carolina Taubles entered into a contract for the construction of a building with the Yerba Buena Building Company. At that time, she was a depositor with the defendant bank. Plaintiffs each performed labor upon and furnished material for the construction of the building, for which they were never paid. The plaintiffs filed liens upon the building, and also served on the owner notices to withhold payments to the building company. For the purpose of settling with the contractor, the owner delivered, in March, 1907, to defendant bank a certain check, drawn upon it, with instructions to pay it to the building company on the production of satisfactory releases of the liens and notices to withhold executed by plaintiffs. The check was subsequently certified by the defendant bank, and remained in its possession for nearly three years, during which time no demand whatsoever was made upon the bank by any one for the funds represented by it. In February, 1910, the construction company served notice upon the defendant bank that it no longer held any interest in the check. In March, 1910, a creditor of the owner, Carolina Taubles, endeavored to levy execution on her account with the defendant bank; and thereupon the bank applied the amount of the money represented by the check upon an indebtedness of said Carolina Taubles to it under its bankers' lien. Subsequently, and on December 8, 1911, plaintiffs herein filed a suit against the bank, claiming that it held the amount of their liens in trust for them. In their argument in support of the judgment, it is claimed by respondents that the transaction between Carolina Taubles and the defendant bank created a trust in their favor. This contention cannot be maintained. There is no evidence to show that the transaction was made for the benefit of plaintiffs. The check was made payable to the Yerba Buena Building Company. Defendant was directed to pay to said company the amount of the deposit upon the production of certain releases of liens and withhold notices. The arrangement in no manner directed the payment to plaintiffs of the amount of their claims, nor was there any duty assumed by the defendant under the arrangement toward plaintiffs or any recognition of their rights. Merely accepting the check under the given

directions in itself created no obligation on the part of the bank toward plaintiffs. There was no contractual obligation between them. Whatever rights plaintiffs had were based upon the Mechanics' Lien Law. This right was initiated by plaintiffs by the filing of their liens. For some reason which the record does not disclose, they failed to pursue this right; but nowhere does the evidence show that their action in this respect was due to the fact that the owner had made the arrangement with the defendant bank for the payment of their claims. The money was not received by defendant for the benefit of plaintiffs, but was received, if for the benefit of anybody, for the benefit only of the building company.

The instructions to the bank were to pay the money to the Yerba Buena Building Company only when it produced satisfactory releases mentioned. The building company never presented any releases or demand for the money; but on the contrary, about three years afterwards, they disclaimed any interest in the fund.

Upon no theory is there any privity between the plaintiffs and the defendant; and no ground exists upon which plaintiffs can claim any right in the fund involved.

There is no evidence to show that plaintiffs relied in any manner upon the deposit thus made or were in any way prejudiced by it. So far as the evidence shows, they did not rely upon the transaction for the payment of their claims; and in fact there is no testimony indicating in the slightest degree that they ever knew anything about it; nor is there any evidence to show that plaintiffs did a single thing that demanded recognition or that defendant recognized their rights or did anything upon which a liability might be created.

The transaction did not constitute a trust, or, as is claimed, an equitable assignment; nor is there anything that could in any manner be construed as creating an estoppel in favor of the plaintiffs, for, so far as the record shows, they knew nothing of it.

The entire transaction was simply a means adopted by the owner of the building of setting aside money with which to pay her contractor, in which the plaintiffs were in no manner privies to or in any manner affected by it. (*Bluthenthal v. Silverman*, 113 Ga. 102, [38 S. E. 344].)

There being no evidence to support the findings that the deposit was made for the benefit of plaintiffs and that they

held such fund in trust, for them, it follows that the judgment must be reversed, and it is so ordered.

Lennon, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on December 5, 1914, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 4, 1915.

[Civ. No. 1261. Third Appellate District.—November 5, 1914.]

KLAMATH LUMBER COMPANY (a Corporation), Respondent, v. **CO-OPERATIVE LAND & TRUST COMPANY** (a Corporation), Appellant.

SALE OF POTATO CRATES—DELIVERY TO THIRD PARTY—LIABILITY OF DEFENDANT—SUFFICIENCY OF EVIDENCE.—In this action to recover the purchase price of certain sweet potato crates alleged to have been sold to defendant, but which were delivered to one of the defendant's customers, who was present at the time the goods were ordered, it is held that the evidence is sufficient to support the finding of the trial court that the crates were sold to defendant, that it promised to pay for them, and upon such promise plaintiff relied in delivering the property.

ID.—EVIDENCE—ABSENCE OF WITNESS—ADMISSIBILITY OF EXPLANATION. In such a case it was proper to show on the trial that the party to whom the crates were delivered was in Oregon in explanation of the fact that he was not called as a witness.

ID.—ERROR WITHOUT PREJUDICE—CONCLUSION OF WITNESS.—In such a case, where a witness was asked "and as president of the corporation, as the manager of the plaintiff in this action, Mr. Routt, did you have any agreement with the defendant in this action in the year 1909?" while technically speaking, the question was probably objectionable, the answer was entirely without prejudice, where from the facts testified to by the witness, the conclusion necessarily followed that the agreement was with the defendant, and said testimony made it obvious that such was the opinion of the witness.

ID.—INSTRUCTIONS—STATEMENT OF NOTICE OF CASE—SALE AND DELIVERY.—An instruction given in such a case at the request of plaintiff

that, "plaintiff brings this action to obtain a judgment against defendant for the sum of \$600.00 alleged to be due plaintiff from defendant for the sale of 4,000 sweet potato crates for which plaintiff alleges defendant promised to pay; that defendant promised to pay it at the rate of fifteen cents per crate, no part of which sum plaintiff alleges has ever been paid," is not objectionable as it is proper for the court to state the nature of the action, and no sensible man would fail to understand that the term "sale" implied a "delivery" of the property, especially where there is no controversy as to the delivery of the crates, the only question being as to whom they were sold.

ID.—ORIGINAL OBLIGATION AND PRINCIPAL DEBTOR—SECTION 2794, CIVIL CODE.—An instruction as to an original obligation and the principal debtor substantially in the language of section 2794 of the Civil Code in such a case is unobjectionable.

ID.—INSTRUCTIONS—THEORY OF CASE.—It is well settled that either party has the right to have an instruction given to the jury based upon his theory of the case, if there is any evidence to support it.

ID.—INSTRUCTIONS—ORIGINAL PROMISE.—In such a case, where the important issue in the case was whether the defendant was liable on an original promise or only on a conditional one, and the jury was fully instructed, at the request of the defendant, as to the distinction between a guaranty and an original promise, there was no error in an instruction that "if you are satisfied from all the evidence adduced in this case that the promise of defendant, if any was made, was an original promise to pay for the crates and not a conditional one, I charge you that it is your duty to find that fact in favor of plaintiff in this action." Such an instruction could hardly be understood as meaning otherwise than to find that the promise of defendant was "an original promise to pay for the crates," if the jury were satisfied from the evidence that an original promise was made by the defendant.

ID.—INSTRUCTION—FURNISHING CRATES TO THIRD PARTY—CONDITIONAL PROMISE.—Where there was no dispute in such a case that the crates were "furnished" to the third party, and it was the contention of defendant throughout the trial not only that this was the fact, but that the third party alone was liable for the purchase price, the reference to such fact could not be prejudicial to the defendant in the following instruction: "The fact that the crates in question were furnished to Gutman by the plaintiff is not of itself absolutely sufficient to show conclusively that the promise of defendant, if any were made, was a conditional one."

APPEAL from a judgment of the Superior Court of Merced County and from an order refusing a new trial. **E. N. Rector, Judge.**

The facts are stated in the opinion of the court.

F. G. Ostrander, for Appellant.

F. W. Henderson, for Respondent.

BURNETT, J.—The action was to recover the sum of six hundred dollars for certain sweet potato crates alleged to have been sold and delivered to defendant. The main controversy is as to whether the crates were sold to defendant or to a certain Mr. Gutman, the evidence being sharply conflicting on this point. Closely related to the foregoing is another contention by appellant that if it ever made any promise to pay plaintiff for the crates it was a conditional one—that is, it would pay if Gutman did not, and, the proviso not being in writing, it was void by reason of subdivision 2 of section 1624 of the Civil Code.

Preliminarily, we may mention certain facts that are undisputed. Plaintiff was engaged in the business of retailing lumber and box materials and the defendant, principally in colonizing land although organized for the purpose also of buying and selling personal property. One of the latter's customers was George Gutman, to whom it had sold a tract of land, the payment therefor to be made out of the crops raised. Said crops were to be marketed in the name of the corporation and the proceeds divided, one-half to be Gutman's and the other to be applied first on the interest and the balance on the purchase price. Among defendant's employees was a salesman by the name of V. H. Gerard, who testified that during the time in controversy one Mr. Cone had control of defendant's business at Merced where the crates were sold. As to the sale itself we must, of course, accept the account that favors respondent's contention. Therefore, we refer specifically to the testimony of J. H. Routt, the president and manager of plaintiff: "About September the fifth to the tenth, in 1909, Mr. Gerard came to my office with a stranger that he introduced as Mr. Gutman, and said: 'We want to get your price on sweet potato crates,' and said that the Co-operative Land & Trust Company had sold Mr. Gutman a piece of land; . . . he spoke of Mr. Gutman as being a model farmer, the amount of crop was then growing and I then gave him prices on sweet potato crates, carload lots to be delivered at Atwater or Livingston, the price named was fifteen cents

per crate; Mr. Gerard then said to me, 'there will be no money available to pay for those crates until they have made a shipment and we have received the returns, and we would like thirty days' time; I told Mr. Gutman the prices quoted were very low and were cash prices, but I says, if you people, referring to the Co-operative Land & Trust Company will pay me, I will give you the time and Mr. Gerard said that is all right, we will do that and stated something of the condition of the contract, it being a crop contract and the money would come through their hands. Mr. Gutman had very little to say; Mr. Gerard said we are not ready to close the deal with you today or at this time, as we want to get prices from the Merced Lumber Company and wherever we can buy them the cheapest we will have to place the order. They left my office and in the afternoon I was anxious about the sale and I went to the Co-operative Land & Trust Company's office and inquired for Mr. Gerard, but did not see him, and Mr. Cone told me that Mr. Gerard was out just then, but would possibly be in soon. I stated to Mr. Cone what I would like to see Mr. Gerard for and I told him my conversation with Mr. Gerard at my office and what he had said to me about Mr. Gutman farming the land and crops and so forth and Mr. Cone also praised Mr. Gutman very highly and seemed to think he was one of the best customers they had sold land to . . . but Mr. Cone said, Mr. Gerard is handling this matter, you take the matter up with him and whatever he does will be all right. . . . Later I telephoned from the Klamath Lumber Company's office to Mr. Gerard. He was in the Co-operative Land Company's office and asked him about the order. He says, 'Mr. Gutman has gone home and we have not decided just what we will do; we have quotations from the Merced Lumber Company just the same as yours fifteen cents per crate, but I will try to favor you with the business. I will turn it your way if I can. I am going out to see Mr. Gutman to-morrow morning and I will let you know after I return.' In the afternoon of the following day Mr. Gerard called me up on the telephone and says, 'Mr. Routt, you can ship a carload of sweet potato crates to Mr. Gutman at Livingston. I asked him how many I should ship and told him that 3000 would make a minimum car, but we usually ship 3500 to 4000 crates to a car and he said ship 4000, that he would probably want more than that. . . . I ordered the

crates by telephone from Sonora and they were shipped and when the thirty days had expired, possibly a few more, I went to Gerard and told him that the time was up and that I would like to have our money. Well he says I will see Mr. Gutman in a day or two; I don't think he has any returns or there has been any returns on the shipment of sweet potatoes. I said all right and in a few days after that I saw him again and he made the same excuse and I said, Mr. Gerard, I need my money and have to pay for those crates, you pay me and then you can get your money from Mr. Gutman. I understand you get a portion of the crop anyway and you can secure yourself. He is a stranger to me and I am looking to you for my money, and not to Mr. Gutman. All right, he said, we will soon get that adjusted. . . . I never presented any bill to Mr. Gutman in the matter; never went to see him; I make out all the bills in the office; I never wrote to him; I made no attempt to collect from Mr. Gutman because I had an agreement with the Co-operative Company people, with Mr. Gerard, and I did not look to Mr. Gutman at all. The reason I entered up the bill in my book against Gutman is that Mr. Gerard told me to ship the shucks to Gutman. . . . I thought they were all in a sense parties to the deal because Mr. Gerard had explained to me that the money—they had the handling of the money from the crops to some extent at least—and I expected that if there was anything due from Mr. Gutman they would collect it and of course they being obligated to me for the payment, would pay me. It was not my idea that I was selling to both of them. I understood that I was selling to the Co-operative Land Company for Mr. Gutman."

It would be difficult to select more apt language than the foregoing to express an agreement of sale to the defendant. The contract was made entirely with Mr. Gerard who assumed to represent appellant; Mr. Routt declared that "if you people (referring to defendant) will pay me, we will give you the time," and Gerard thereupon said, "that is all right, we will do that." Furthermore, it appears that Routt understood that he was selling to the Co-operative Land & Trust Company and that he looked entirely to it for payment. It thus appears that the creditor parted with value and entered into the obligation in terms and under circumstances

such as to render defendant not simply the principal debtor but the only debtor in the case.

It is equally plain that, according full credit to the testimony of Mr. Routt, no question of guaranty could arise. The only other consideration remaining as to the obligation of defendant to pay the purchase price of the crates involves the authority of Gerard to make the contract for defendant. There is no doubt, however, that Cone had full power in the premises and his statement to Routt would bind the company and preclude any denial of Gerard's authority after plaintiff, in reliance upon it, had sold the crates.

In view of the foregoing, we do not see how it can be seriously argued that the evidence is insufficient to support the conclusion that the crates were sold to defendant, that it promised to pay for them and that upon such promise plaintiff relied in delivering said property.

The alleged errors in the admission and rejection of testimony are hardly of sufficient gravity to merit specific notice. It was proper for plaintiff to show that Gutman was in Oregon in explanation of the circumstance that he was not called as a witness. Besides, the fact sufficiently appeared without objection.

The following question was asked of Mr. Routt: "And as president of the corporation, as the manager of the plaintiff in this action, Mr. Routt, did you have any agreement with the defendant in this action in the year 1909"? Technically speaking, the question probably was objectionable, but the answer was entirely without prejudice as, from the facts testified to by the witness, the conclusion necessarily followed that the agreement was with defendant and said testimony made it obvious that such was the opinion of the witness.

We can see no valid objection to this instruction, given by the court on request of plaintiff: "Plaintiff brings this action to obtain a judgment against defendant for the sum of six hundred dollars alleged to be due plaintiff from defendant for the sale of 4000 sweet potato crates for which plaintiff alleges defendant promised to pay; that defendant promised to pay it at the rate of fifteen cents per crate, no part of which sum plaintiff alleges has ever been paid." It was proper for the court thus to state the nature of the action, although it is quite probable that the jury had already been fully advised of the claim of each party. There could be no

reasonable apprehension that any sensible man would fail to understand that the term "sale" implied a "delivery" of the property. Besides, there was no controversy as to the *delivery* of the crates, the only question being as to whom they were sold.

The instruction as to an *original obligation* and the *principal debtor* is substantially in the language of section 2794 of the Civil Code and, as a principle of law, is unobjectionable. That it embodied the theory of plaintiff as to the character of the transaction in question cannot be doubted and that there was evidence to support that theory has already appeared. It is well settled, of course, that either party has the right to have an instruction given to the jury, based upon his theory of the case, if there is any evidence to support it. (*Buckley v. Silverberg*, 113 Cal. 673, [45 Pac. 804].)

We think it is plain enough to what fact the court referred in this instruction: "If you are satisfied from all of the evidence adduced in this case that the promise of defendant, if any was made, was an original promise to pay for the crates and not a conditional one, I charge you it is your duty to find that fact in favor of plaintiff in this action." It could hardly be understood as meaning otherwise than an instruction to find that the promise of defendant was "an original promise to pay for the crates" if the jury were satisfied from the evidence that an original promise was made by defendant. This was the important issue in the case and while the instruction, embodying as it does, such a truism, was not necessary, it could have done no harm. It may be said in this connection that the distinction between a *guaranty* and an *original promise* was fully set forth in instructions given by request of defendant and nothing was left uncertain as to the meaning of those terms.

As we view it, the only ground for plausible criticism as to the instructions is afforded by this direction: "The fact that the crates in question were furnished to Gutman by the plaintiff is not of itself absolutely sufficient to show conclusively that the promise of defendant, if any were made, was a conditional one." As to the statement of fact in the first part of the instruction, it may be said that there was no dispute that the crates were "furnished" to Gutman. They were shipped to him for use on the land that he had purchased from appellant. In fact, it was the contention of

defendant throughout the trial not only that the crates were furnished to Gutman but that he alone was liable for the purchase price. The reference to said circumstance as a fact could not therefore be prejudicial independent of the consideration that said fact was favorable to appellant. It is true also, as a matter of law, that said fact was "not of itself *absolutely sufficient* to show *conclusively* that the promise of defendant, if any, was a conditional one." If "*absolutely conclusive*," all the foregoing discussion would be idle as no other alternative would have been left the lower court but to direct a verdict for defendant. The truth is, of course, that said fact was a circumstance to be considered by the jury in determining whether defendant was primarily liable for the purchase price of the crates, but it is not at all conclusive of the question.

There is more reason for contending that the instruction is somewhat argumentative and for that reason should have been omitted, but it is entirely apparent from the whole charge, full, fair, and complete as it was in its entirety, that the jury were not misled by the court in any respect.

We feel satisfied that there is no substantial merit in any of the points made by appellant, and the judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1864. First Appellate District.—November 7, 1914.]

HERMAN I. STERN, as School Director of the City of Berkeley, Appellant, v. THE CITY COUNCIL OF THE CITY OF BERKELEY et al., Respondents.

MUNICIPAL CORPORATIONS—SCHOOL LAW—COMPENSATION OF SCHOOL DIRECTOR—CHARTER OF BERKELEY—CONSTITUTIONALITY OF SECTION 19, ARTICLE V.—Section 19 of article V of the charter of the city of Berkeley, which provides that "each school director shall receive \$5.00 for each regular meeting of the board of education which he shall attend, provided that he shall not receive more than \$15.00 in any month," is not invalid under subdivision 2 of section 8½ of article XI of the constitution, as it existed prior to the amendment of October 1911, notwithstanding that such subdivision of the con-

stitution, prior to such amendment, contained no express provision authorizing municipal corporations to provide in their charters for the payment of school director's salaries.

ID.—CITY CHARTERS—CONSTRUCTION.—The provisions of city charters must be upheld unless they are clearly shown to have been at the time of their enactment repugnant to and inconsistent with the then fundamental law.

ID.—NATURE OF CITY CHARTERS—LAWS OF STATE.—A city charter framed and adopted pursuant to constitutional provisions is not a law passed by a municipality, but is a law of the state, having the same force and effect as a law directly enacted by the legislature.

ID.—CONSTITUTIONAL LIMITATIONS — POWERS OF LEGISLATURE.—CHARTERS.—Our constitution is not a grant of power but rather a limitation upon the powers of the legislature; and it is competent for the legislature to exercise all powers not forbidden by the constitution of the state or delegated to the general government or prohibited by the constitution of the United States. Accordingly, it has been held that unless prohibited by some provision of the constitution, expressed or necessarily implied from its terms, a municipal charter adopted, as provided in article XI of the constitution, may contain any provision not in conflict with or covered by the general laws of the state.

ID.—GENERAL SCHOOL LAWS—CONFLICTING CHARTER PROVISIONS CONTROLLED BY.—The acts passed by the legislature, in accordance with general provisions of the constitution, providing a general system of laws concerning the creation and conduct of common schools in this state, are controlling and conclusive over conflicting charter provisions; but the charter of a city or of a city and county may provide for matters not enumerated in the general laws and not in conflict therewith. The power of charters to so provide extends to all cases where the purpose of the provision is in furtherance of the purpose of the general laws of the state.

ID.—COMPENSATION OF SCHOOL DIRECTORS—CHARTER PROVISION REGULATING—NOT CONFLICTING WITH GENERAL LAWS.—There is no general law with respect to the compensation to be paid to school directors or trustees; and the general laws relating to and regulating the state school system nowhere limit or deny the right of a municipality or of the legislative power acting through a freeholder's charter to make provision for the payment of salaries to school trustees or directors; and the provision of section 19 of article V of the charter of the city of Berkeley, providing for compensation of school directors, is valid, being obviously in furtherance of the school system adopted by the state and does not conflict with the general laws relating to and regulating the same.

ID.—SCHOOL DIRECTOR A MUNICIPAL OFFICER—COMPENSATION A MUNICIPAL AFFAIR.—A school director of the city of Berkeley is a municipal

pal officer, irrespective of whether or not the duties of the office are exacted by the charter or imposed by the general law of the state, and therefore the compensation to be paid him by the city out of the city treasury for services rendered the city in maintaining its school system as an integral part of the state school system is purely a municipal affair which is exclusively controlled by charter provisions.

ID.—CHARTER PROVIDING COMPENSATION OF SCHOOL DIRECTOR NOT SPECIAL LEGISLATION.—The provision of the charter of the city of Berkeley providing for compensation of school directors is not a special law under subdivision 28 of section 25 of article IV of the constitution.

ID.—MUNICIPAL CHARTER—GENERAL LEGISLATION.—Where a municipal charter as a whole is germane to the purpose of its creation, and its various sections are subordinate to and in harmony with the fundamental and statutory law of the state and affect all persons and things alike in the particulars provided for, the objection that such charter, or any provision thereof, is special legislation, cannot be successfully maintained.

APPEAL from a judgment of the Superior Court of the County of Alameda. T. W. Harris, Judge.

The facts are stated in the opinion of the court.

Vincent Surr, and William H. Bryan, for Appellant.

Redmond C. Staats, and Geo. L. Hughes, for Respondents.

LENNON, P. J.—The appellant in this proceeding is a school director of the city of Berkeley. He sought by a petition for writ of mandate presented to the superior court of Alameda County to compel the respondents as members of the city council to issue to him a warrant upon the city treasury for his salary as school director. An alternative writ was issued, a demurrer to which was sustained without leave to amend; and this appeal is from the judgment thereupon entered.

Petitioner's claim to the salary in controversy is based on section 19 of article V of the charter of the city of Berkeley, which provides that "each school director shall receive five dollars for each regular meeting of the board of education which he shall attend, provided that he shall not receive more than fifteen dollars in any month."

The question here involved is the validity of this provision, considered in conjunction with the constitution of the state, as such constitution existed prior to the amendment in October, 1911, of subdivision 2 of section 8½ of article XI, which amendment reads as follows:

(1) "It shall be competent, in all charters framed under authority given by section 8 of article eleven of this constitution to provide, in addition to those provisions allowable by this constitution and by the laws of this state, as follows: . . . (2) for the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, and for the number which shall constitute any one of such boards."

This subdivision, as amended, in October, 1911 (Stats, 1911, p. 2166), expressly declares that it shall be competent in all charters framed under authority of section 8 of article XI of the constitution to provide for the qualifications, compensation, and removal of members of boards of education. It thus appears that prior to the amendment in question, the power of city charters to fix the compensation of members of boards of education was not in express terms given by the constitution. It is not contended, however, upon behalf of the respondents, that the amendment referred to is retroactive or that it in any wise affects the constitutionality of the charter provisions in controversy here. It is the contention of respondents that, before the amendment to the constitution in the particulars stated, a municipal corporation was not authorized to provide for the payment of salaries to school directors; and therefore it is argued that the charter provision in question had no basis for its enactment and is therefore void. The charter provision in question must be upheld unless it is clearly shown to have been at the time of its enactment repugnant to and inconsistent with the then existing fundamental law. A charter framed and adopted pursuant to the constitutional provisions is not a law passed by a municipality. It is a law of the state having the same force and effect as a law directly enacted by the legislature. As was said in *Ex parte Sparks*, 120 Cal. 395, 399, [52 Pac. 715, 717], "it is clear that it is made a law by the legislature, and becomes a law by this expression of the sovereign will of the state. It prevails and has force as a law of the state, and is not made a law by the people of the municipality by virtue

of authority delegated to them. It is proposed by the municipality, and is accepted and passed into a law by the legislature or rejected, as it shall see fit." (See, also, *Sheehan v. Scott*, 145 Cal. 684, 685, [79 Pac. 350]; *Fragley v. Phelan*, 126 Cal. 383, [58 Pac. 923]; *Frick v. Los Angeles*, 115 Cal. 512, [47 Pac. 250].)

Our constitution is not a grant of power, but rather a limitation upon the powers of the legislature; and it is competent for the legislature to exercise all powers not forbidden by the constitution of the state or delegated to the general government or prohibited by the constitution of the United States. Accordingly, it has been held that unless prohibited by some provision of the constitution expressed or necessarily implied from its terms, a municipal charter adopted as provided in article XI of the constitution may contain any provision not in conflict with or covered by general laws of the state. (*Los Angeles School District v. Longden*, 148 Cal. 380, [83 Pac. 246].) It is true that the legislature, in keeping with the general provisions of the constitution, has provided a general system of laws concerning the creation and conduct of the common schools of the state. These laws are controlling and conclusive over conflicting charter provisions; but the charter of a city or of a city and county may provide for matters not enumerated in the general laws and not in conflict therewith. (*McKenzie v. Board of Education*, 1 Cal. App. 407; [82 Pac. 392]; *Kennedy v. Miller*, 97 Cal. 429, [32 Pac. 558].) The power of charters to so provide extends to all cases where the purpose of the provision is in furtherance of the purpose of the general laws of the state. (*Los Angeles School District v. Longden*, 148 Cal. 380, [83 Pac. 246].) In the present case the charter provision in question is obviously in furtherance of the school system adopted by the state and does not conflict with the general laws relating to and regulating the same. There is no general law with respect to the compensation to be paid to school directors or trustees. The general laws relating to and regulating the state school system nowhere limit or deny the right of a municipality or of the legislative power acting through a freholder's charter to make provision for the payment of salaries to school trustees or directors.

It is further contended upon behalf of the respondents that inasmuch as the public school system of the state has been

made by the constitution and general laws a matter of general concern, the regulation of that system is a state affair, as distinguished from a municipal affair; and therefore can be rightfully covered and controlled only by general state laws. Generally speaking, this may be so; but in our opinion appellant, as a school director of the city of Berkeley, is a municipal officer, irrespective of whether or not the duties of the office are exacted by the charter or imposed by the general law of the state, and therefore the compensation to be paid him by the city out of the city treasury for services rendered the city in maintaining its school system as an integral part of the state school system is purely a municipal affair, which is exclusively controlled by charter provisions. (*Trefts v. McDougald*, 15 Cal. App. 584, [115 Pac. 655].)

The further contention that the charter provision in question is a special law and is therefore unconstitutional under subdivision 28 of section 25 of article IV of the constitution is untenable. Necessarily the charters of the various cities throughout the state must differ in many minor details in order to conform to the varying needs of different localities. Such differences, however, will not operate to bring each of the many existing city charters within the category of special legislation. Where a municipal charter as a whole is germane to the purpose of its creation, and its various sections are subordinate to and in harmony with the fundamental and statutory law of the state and affect all persons and things alike in the particulars provided for, the objection that such charter or any provision thereof is special legislation cannot be successfully maintained. (*Potwin v. Johnson*, 108 Ill. 70; *People ex rel. v. Hoffman*, 116 Ill. 587, [56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788]; *Ladd v. Holmes*, 40 Or., 167, [91 Am. St. Rep. 457, 66 Pac. 714]; *Nichols v. Walter*, 37 Minn. 264, [33 N. W. 800].)

Respondents' contention that the petition does not show that the city of Berkeley has any funds from which his claim could be paid is answered by the petition itself, which alleges that there are moneys in the general fund for this purpose.

What we have thus far said in effect covers and disposes of the remaining points made upon behalf of the respondents. In conclusion, it may be said that we have been cited by opposing counsel to all of the decisions of our appellate courts relating to powers conferred under various charter provisions.

It would be a matter of supererogation to reassert the doctrines laid down in those cases. We are satisfied that nothing contained in the legislative enactments or in any of the expressions of opinion of the courts of last resort upon the subject in hand conflicts with the conclusions we have reached here.

For the reasons stated, it is ordered that the judgment appealed from be reversed, with instructions to the lower court to overrule the demurrer and require the respondents to answer.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 1885. First Appellate District.—November 7, 1914.]

STATE SAVINGS AND COMMERCIAL BANK (a Corporation), Appellant, v. ELISABETH F. WINCHESTER et al., Respondents.

FORECLOSURE OF MORTGAGE—LOAN TO CORPORATION BY BANK—FRAUD ON CORPORATION—ESTOPPEL.—Where the president and general manager of a corporation made application to a bank upon behalf of the corporation for a credit loan of fifteen thousand dollars, which application was approved, and the credit given the corporation upon the books of the bank, for which three notes were executed in different sums to the bank by the manager of the corporation in the name of the company; thereafter the notes were taken up with a renewal note of the company, which renewal note was indorsed by the manager and other directors of the corporation, and after the sum of three thousand five hundred dollars had been paid and indorsed on the note, one of the indorsers, having sold his interest in the corporation, was released by the bank, in consideration of the execution of the mortgage in question by respondent as security for the payment of the indebtedness due upon the renewal note, and a second renewal note was thereupon executed in the sum of eleven thousand five hundred dollars, upon which the name of the respondent replaced that of the released indorser; and the trial court found that the manager of the corporation was without authority to execute the first renewal note, that the company never received any benefit from the moneys obtained upon the note and that the same was procured to be signed by fraud and through false and fraudulent representations, the basis for this finding being that prior to the execution of the original notes, the manager of the cor-

poration, the secretary of the bank, and others had entered into an agreement to secure control of the bank by purchasing a certain amount of its capital stock; that the loan was used by the manager of the corporation for the purpose of purchasing a controlling interest in the bank and not for the use and benefit of the company; that in order to conceal and cover up this phase of the transaction the manager represented to the corporation that it was necessary to borrow fifteen thousand dollars from the bank, to be used in the business of the company, that he could secure such a loan from the bank if a resolution were passed authorizing the same, which resolution was duly passed, but made no reference to past loans by the bank to the company; and it being further found that all subsequent notes made by the company to the bank, including the note and mortgage in suit and the indorsements and guaranties thereon, were made without any knowledge on the part of the makers thereof of the original transaction and were made in the belief that the money borrowed, guaranteed, and secured had been procured under the resolution mentioned, that in fact no loans were made by the bank under said resolution and that the only money the bank parted with was the sum originally advanced—under the circumstances the knowledge of the transaction gained by the secretary of the bank being imputable to the bank, the latter is estopped from claiming that the loan was made in the regular course of business, and the evidence sustained the findings and the judgment in favor of the defendant.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. James M. Seawell, Judge.

The facts are stated in the opinion of the court.

F. A. Cutler, and F. R. Sweasey, for Appellant.

E. A. Bridgford, for Respondents.

LENNON, P. J.—This is an appeal from a judgment and from an order denying a new trial. The action was one to foreclose a mortgage executed by defendant and respondent, Elisabeth F. Winchester, as security for the payment of a promissory note in the sum of eleven thousand five hundred dollars, made by the Main-Winchester-Stone Company, as maker, and the respondent as indorser and guarantor. The execution of both the note and mortgage was an admitted fact in the case; but as a defense to the foreclosure proceedings, it was alleged that the note and mortgage were executed

without consideration to either the respondent, Elisabeth F. Winchester, or to the Main-Winchester-Stone Company, and that the same were both obtained by false and fraudulent representations.

The facts leading up to the transaction in suit, and out of which the claim of fraud arises, are in substance as follows:

On December 13, 1906, A. G. Stoll, the then president and general manager of the Main-Winchester-Stone Company, made application to the appellant bank upon behalf of said company for a credit loan of fifteen thousand dollars. The application for the loan was approved; and a credit was thereupon given to the Main-Winchester-Stone Company upon the books of the bank in the sum mentioned, for which three notes were executed in different sums to the bank by Stoll in the name of the company. Thereafter, these notes were taken up with a renewal note of said company for fifteen thousand dollars, which renewal note was indorsed by A. G. Stoll, R. P. Grubb, a Mr. Richardson, and Frank Winchester, all directors of the Main-Winchester-Stone Company. After the sum of three thousand five hundred dollars had been paid and indorsed thereon, Richardson, having sold his stock in the Main-Winchester-Stone Company, desired to be released as an indorser of said renewal note. The bank thereafter released him, in consideration of the giving by respondent, Elisabeth F. Winchester, of the mortgage in question, as security for the payment of the indebtedness due upon the renewal note. A second renewal note was thereupon executed in the sum of eleven thousand five hundred dollars, upon which the name of Elisabeth F. Winchester replaced that of Richardson as indorser, and at the same time and as a part of the same transaction, the mortgage in question was executed as security therefor. The indorsement of the second renewal note and the execution of the mortgage by respondent were in lieu of the prior indorsement of Richardson.

The trial court found that Stoll as the president and general manager of the Main-Winchester-Stone Company was without authority to execute the first renewal note in controversy, that said company never received any benefit from the money obtained upon the note, and that the same was procured to be signed by fraud and through false and fraudulent representations. In support of and as a basis for this

finding, the trial court also found that prior to the execution of the original notes involved in the transaction, A. G. Stoll, C. P. Hagg, who was the then secretary of the appellant bank, and other persons, had entered into an agreement to secure control of the appellant bank by purchasing a certain amount of its capital stock; that the loan procured by Stoll, to and in the name of the Main-Winchester-Stone Company, from the appellant bank, was procured and used by him for the purpose of purchasing a controlling interest in the appellant bank and not for the use and benefit of said company; that, in order to conceal and cover up this phase of the transaction, Stoll, on January 15, 1907, represented to the Main-Winchester-Stone Company that it was necessary to borrow fifteen thousand dollars from the appellant bank, to be used in the business of the company; that he could secure such a loan from the appellant bank if a resolution were passed authorizing the same; that such resolution was duly passed authorizing a loan from the appellant bank not to exceed fifteen thousand dollars; and that such resolution made no reference to past loans made by appellant bank to the Main-Winchester-Stone Company.

It was further found that all subsequent notes made by said Main-Winchester-Stone Company to appellant bank, including the note and mortgage in suit and the indorsements and guarantees thereon, were made without any knowledge on the part of the makers thereof, of the transaction of December, 1906; but that such notes, indorsements, guarantees, and mortgage were made in the belief that the money borrowed, guaranteed, and secured had been procured by Stoll under the resolution of January 15, 1907; that, in fact, no loans were made by appellant bank under said resolution, and that the only money appellant bank parted with was the sum advanced in December, 1906, Upon these facts judgment went for defendant.

It is conceded by appellant that a corporation can act only through its board of directors, and that the public generally act at their peril with one purporting to represent such corporation without evidence of his being authorized by the governing board of such corporation. It is insisted, however, that the evidence shows that the Main-Winchester-Stone Company so conducted itself as to be estopped from denying that

Stoll had authority to make the loan for want of the proper resolution.

On the other hand, it is the contention of the defense that the money obtained from the appellant bank by Stoll and claimed to have been wrongfully diverted from the use of the Main-Winchester-Stone Company was advanced by the bank for the individual use of one of the directors of the company with the knowledge of the bank.

The trial court adopted the view that, inasmuch as Hagg was secretary of the appellant bank, any knowledge gained by him in the transaction with Stoll was imputable to the bank. In this behalf, as previously stated in substance, the trial court found that arrangements were made between Hagg, the secretary of the appellant bank, and Stoll and others prior to the loan of December, 1906, to get control of the bank; but Stoll was without the necessary funds to pay for his proportion of the stock; that in the making of the application and obtaining of the loan, he dealt only with Hagg and never saw or dealt with any other officer of the bank, in connection with the transaction; that shortly after the loan was made, a majority of the stock of appellant bank was transferred to Stoll, Hagg, and others; and that they were immediately installed as directors of the bank.

There is evidence, in our opinion, to support this finding, and this finding in turn supports the conclusion and judgment of the trial court to the effect that the appellant bank was estopped from claiming that the loan in controversy was made in the regular course of business. (5 Cyc. p. 460.)

The judgment and order appealed from are affirmed.

Kerrigan, J., and Richards, J., concurred.

[Civ. No. 1387. First Appellate District.—November 7, 1914.]

JAMES TYSON et al., as Trustees, Respondents, v. A. W. REINECKE, Appellant.

CONTRACT OF GUARANTY—GUARANTY OF PAYMENT OF ACCOUNT AT DUE DATE—CHANGE OF TIME OF PAYMENT—WHEN GUARANTOR NOT EXONERATED.—Where a contract provided, in consideration of past and future deliveries of lumber and other materials, for a guaranty of payment for the same at "due date," and at the time the guaranty was executed the sales were upon a credit of sixty days, but there was no usage of trade or contract between the parties under which the debtor was entitled to a credit upon all sales at sixty days, and there is nothing to show that the creditor knew that the guarantor was aware of the length of credit that was being extended, the creditor was authorized to extend the credit for any reasonable length of time, and the guarantor was not exonerated from his contract of guaranty by the creditor accepting a series of notes thirty days after date of the sale payable in each case more than sixty days thereafter, where the term of credit was not unreasonable and did not materially change the contract of guaranty.

ID.—DUE DATE—COMMERCIAL MEANING OF.—While there seems to be no judicial interpretation of the term "due date," in commercial transactions, generally speaking, it means that an account will be paid at the time fixed or agreed upon for payment.

ID.—PAYMENT OF ACCOUNT—WHEN NOTES NOT ACCEPTED AS—CONFLICTING EVIDENCE—FINDINGS CONCLUSIVE.—It is held in this action that, as the evidence is conflicting upon the question as to whether certain promissory notes were given in payment of the account in question, the finding of the trial court to the effect that they were not given as such payment, cannot be disturbed on appeal.

ATTACHMENT—AMOUNT STATED IN WRIT GREATER THAN IN AFFIDAVIT—AMENDMENT OF WRIT—SECTION 558 CODE CIVIL PROCEDURE.—Although a writ of attachment is issued for a greater amount than that stated in the affidavit for the writ, where the trial court, under the terms of section 558 of the Code of Civil Procedure, as amended in 1909, permitted an amendment of the writ which made it and the affidavit agree in amount, which amendment the court was authorized to make, an order denying a motion to dissolve the attachment upon that ground cannot be disturbed on appeal.

ID.—GUARANTY—CONTRACT FOR DIRECT PAYMENT OF MONEY.—A contract of guaranty is a contract for the "direct payment of money," within the meaning of the sections of the code providing for attachment, and the payment being "direct," it is immaterial whether the obligation is principal or collateral.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial, and from an order refusing to dissolve an attachment. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

F. H. Dam, for Appellant.

Denson, Cooley & Denson, for Respondents.

RICHARDS, J.—This is an action on a guaranty. The appeal is by defendant from a judgment and from an order denying him a new trial. Defendant also appeals from an order refusing to dissolve an attachment.

Plaintiffs are assignees of Gage, Mills & Co., a partnership, and the action is brought for the reasonable value and the alleged contract price of lumber alleged to have been sold and delivered by said partnership to the Metropolis Construction Company, a corporation, and is founded upon a written instrument of guaranty signed by defendant in the words and figures as follows:

“San Francisco, Cal., Dec. 21st, 1909.

“MRS. GAGE MILLS & Co.,

“No. 2005 Market St., City.

“Gentlemen:

“In consideration of having delivered lumber & other materials & that you will continue to deliver same to the Metropolis Construction Co. of No. 24 Cal. St.—I hereby guarantee the payment—at due date—of all the accounts for goods already delivered & to be delivered to the above Construction Co. in the future.

“Yours truly,

“A. W. REINECKE.

“Witness: Louis P. Schwerdt.”

The answer admits the execution by the defendant of the said instrument of guaranty, but denies all the other material allegations of the complaint, and pleads exoneration of the guaranty under section 2819 of the Civil Code.

After trial, the court found in favor of the plaintiffs on all the issues and judgment was accordingly entered against the defendant for the sum of \$6319.91, being the amount of plain-

tiffs' demand and interest from the time of commencing suit to the rendition of judgment. The defendant owned one share of stock in the Metropolis Construction Company. He was also, as he termed it, "accommodation treasurer" of the corporation, but performed none of the duties of that office. The partnership had been selling lumber to the corporation for several weeks, when W. L. B. Mills, a member of the partnership, prepared the instrument of guaranty here declared on, and sent it by Louis P. Schwerdt, a salesman of the partnership, to the defendant, with the request that the defendant should sign the same, which the defendant did. Originally, and for several months after the guaranty was made, the partnership was selling to the corporation "cash on sixty days." Subsequently the corporation being slow in its payments the partnership refused to give the corporation sixty days' time to pay its bills; and it was accordingly arranged between them that thirty days' time should be given the corporation when if it could not pay, notes at between thirty days and sixty days would be accepted. Under this arrangement, the partnership accepted a series of notes from the corporation, commencing in May, 1910, and ending in November, 1910, which notes were payable in thirty, thirty-five, forty-five, and sixty days after date. The notes given by the corporation to the partnership to and including September, 1910, were all paid by the corporation at maturity. A note given October 31, 1910, payable in thirty days, was also paid at maturity. The corporation, however, gave and the partnership accepted two notes which are unpaid for goods sold in September, 1910, also two notes for goods sold in October, 1910, which are not paid. These notes were given and accepted by the partnership in each instance thirty days after the sale and for a sufficient number of days to make the day of payment in each instance more than sixty days after the sale.

It is the contention of the defendant that these four notes, aggregating five thousand one hundred dollars, extended the time of payment of the amount, and that the acceptance of such notes by the partnership, under the terms of section 2819 of the Civil Code, exonerated the defendant *pro tanto* from the guaranty.

There can be no doubt that if what was done in this case as to each of the notes would amount to an extension of the

time of payment thereof beyond what was understood by the parties to be meant by the term "due date," the defendant was exonerated, and plaintiff cannot recover. (*Daneri v. Gazzola*, 139 Cal. 418, [73 Pac. 179]; 20 Cyc. 1443.) The question then to be decided calls for a construction of the term "due date." There seems to be no judicial interpretation of the meaning of the term; but it is clear that in commercial transactions, generally speaking, it means that an account will be paid at the time fixed or agreed upon for its payment. In this case, at the time the guaranty was executed, the co-partnership was selling to the corporation goods upon a credit of sixty days; but there is no circumstance in the case that would warrant the conclusion that there was a usage of trade or a contract between the parties, under which the corporation was entitled to a credit upon all sales at sixty days. Schwerdt, the salesman for the partnership, who took the guaranty to the defendant to be signed, had no authority to bind the partnership to give the corporation sixty days' credit; nor did anything he said on that occasion have that effect. What he said there amounted to no more than a statement that at that time the partnership was giving the corporation sixty days' credit on all sales. Mills, who acted exclusively for the partnership concerning these matters, testified that the conversation between Schwerdt and the defendant as to the sixty days' credit was not reported back to him. If this was true, there is nothing in the record to show that the partnership knew that defendant was aware of the length of credit that was being extended to the Metropolis Construction Company; so, from the facts in the case, we hold that, even if the defendant had knowledge that the corporation was receiving sixty days' credit on all deliveries at and before the execution of the guaranty, there being no usage or understanding to the contrary, the partnership was authorized to extend the corporation credit for any reasonable length of time, and that some length of credit was contemplated by all the parties concerned.

But, as by the terms of the guaranty the credit was not limited or restricted in any respect as to time, we think that any reasonable change as to the length of the credit would not relieve the guarantor from his liability thereunder, unless such term of credit materially changed the contract of

guaranty. It is not claimed that the terms, as changed, were unreasonable.

When the guaranty was executed, the period of credit was sixty days. Subsequently, in order that the corporation and the partnership might continue business relations, that period of credit was changed and a new date of payment was agreed on,—namely, that thirty days' credit should be given, at the expiration of which the account was to be paid or at the option of the corporation it was to give its note for some period of time varying according to circumstances from thirty to sixty days. Under these facts it is apparent that the giving of the notes was a part of the new arrangement which did not, in any material respect, change the contract of guaranty, and they marked the period of credit within which the payments were to be made. This brings the guarantor within the terms of his guaranty,—namely, that the accounts would be paid at "due date," and his liability follows.

Coming now to the proposition of whether or not the notes may be regarded as having been given and accepted as absolute payment, little need be said. Receipts for the notes and entries in the books of account kept by the partnership refer to the notes as having been received in payment. This, with other evidence in the record, would be sufficient, no doubt, to support a finding that the notes were accepted by the partnership as payment (*Jenns v. Burger*, 120 Cal. 444, [52 Pac. 706]), but Mr. Mills, who, as before stated, acted throughout these transactions for the partnership, denied that the notes were so accepted, and it is also in evidence that, in looking over the books of account of the concern and observing that the notes were entered therein as payment, Mills told the concern's bookkeeper that those entries were incorrect, and in the future to enter them as notes. In brief, it appears quite clear from a reading of the whole record that it was not the intention of the parties that the notes should be accepted in satisfaction of the accounts. In any event, it is certain there is a conflict in the evidence on this branch of the case, and for this reason we cannot, even if we were so inclined, disturb the finding of the court, which was against the defendant.

As to the appeal from the order denying a motion to dissolve the writ of attachment issued in the above entitled action, it appears that the ground of the motion was that

the writ of attachment issued for a greater amount than that stated in the affidavit. Assuming that this was true, in which event the motion would be well founded (*Finch v. McVean*, 6 Cal. App. 272, [91 Pac. 1019]; *O'Connor v. Roark*, 108 Cal. 173, [41 Pac. 465]), still, as the court, under the terms of section 558 of the Code of Civil Procedure, as amended in 1909, permitted an amendment of the writ which made it and the affidavit therefor agree in amount, and as we think in so doing the court acted within the authority vested in it by that section, it follows that its order cannot be disturbed.

Taking up the last point made by defendant, we think it equally clear that a contract of guaranty is a contract "for the direct payment of money." It is a collateral contract for a "direct payment of money." If the payment is "direct," it is immaterial whether the obligation is principal or collateral. (*Hathaway v. Davis*, 33 Cal. 161, 167; *San Francisco v. Brader*, 50 Cal. 506; *County of Monterey v. McKee*, 51 Cal. 255; *McKee v. Monterey County*, 51 Cal. 275.)

It follows from what has been said that the appeal from the judgment and from the order refusing a new trial, as well as the appeal from the order refusing to dissolve the attachment, should be affirmed, and it is so ordered.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 5, 1915.

poration, the secretary of the bank, and others had entered into an agreement to secure control of the bank by purchasing a certain amount of its capital stock; that the loan was used by the manager of the corporation for the purpose of purchasing a controlling interest in the bank and not for the use and benefit of the company; that in order to conceal and cover up this phase of the transaction the manager represented to the corporation that it was necessary to borrow fifteen thousand dollars from the bank, to be used in the business of the company, that he could secure such a loan from the bank if a resolution were passed authorizing the same, which resolution was duly passed, but made no reference to past loans by the bank to the company; and it being further found that all subsequent notes made by the company to the bank, including the note and mortgage in suit and the indorsements and guaranties thereon, were made without any knowledge on the part of the makers thereof of the original transaction and were made in the belief that the money borrowed, guaranteed, and secured had been procured under the resolution mentioned, that in fact no loans were made by the bank under said resolution and that the only money the bank parted with was the sum originally advanced—under the circumstances the knowledge of the transaction gained by the secretary of the bank being imputable to the bank, the latter is estopped from claiming that the loan was made in the regular course of business, and the evidence sustained the findings and the judgment in favor of the defendant.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. James M. Seawell, Judge.

The facts are stated in the opinion of the court.

F. A. Cutler, and F. R. Sweasey, for Appellant.

E. A. Bridgford, for Respondents.

LENNON, P. J.—This is an appeal from a judgment and from an order denying a new trial. The action was one to foreclose a mortgage executed by defendant and respondent, Elisabeth F. Winchester, as security for the payment of a promissory note in the sum of eleven thousand five hundred dollars, made by the Main-Winchester-Stone Company, as maker, and the respondent as indorser and guarantor. The execution of both the note and mortgage was an admitted fact in the case; but as a defense to the foreclosure proceedings, it was alleged that the note and mortgage were executed

without consideration to either the respondent, Elisabeth F. Winchester, or to the Main-Winchester-Stone Company, and that the same were both obtained by false and fraudulent representations.

The facts leading up to the transaction in suit, and out of which the claim of fraud arises, are in substance as follows:

On December 13, 1906, A. G. Stoll, the then president and general manager of the Main-Winchester-Stone Company, made application to the appellant bank upon behalf of said company for a credit loan of fifteen thousand dollars. The application for the loan was approved; and a credit was thereupon given to the Main-Winchester-Stone Company upon the books of the bank in the sum mentioned, for which three notes were executed in different sums to the bank by Stoll in the name of the company. Thereafter, these notes were taken up with a renewal note of said company for fifteen thousand dollars, which renewal note was indorsed by A. G. Stoll, R. P. Grubb, a Mr. Richardson, and Frank Winchester, all directors of the Main-Winchester-Stone Company. After the sum of three thousand five hundred dollars had been paid and indorsed thereon, Richardson, having sold his stock in the Main-Winchester-Stone Company, desired to be released as an indorser of said renewal note. The bank thereafter released him, in consideration of the giving by respondent, Elisabeth F. Winchester, of the mortgage in question, as security for the payment of the indebtedness due upon the renewal note. A second renewal note was thereupon executed in the sum of eleven thousand five hundred dollars, upon which the name of Elisabeth F. Winchester replaced that of Richardson as indorser, and at the same time and as a part of the same transaction, the mortgage in question was executed as security therefor. The indorsement of the second renewal note and the execution of the mortgage by respondent were in lieu of the prior indorsement of Richardson.

The trial court found that Stoll as the president and general manager of the Main-Winchester-Stone Company was without authority to execute the first renewal note in controversy, that said company never received any benefit from the money obtained upon the note, and that the same was procured to be signed by fraud and through false and fraudulent representations. In support of and as a basis for this

These facts were known to the plaintiff, having been within his almost daily observation since his employment began; in fact within a few days before the date of the accident the cars had become derailed at the same point and for the same cause while the plaintiff was engaged in hauling them, and this had occurred at least four or five times to the plaintiff during the three months of his employment by the defendant. On the last of these occasions prior to the accident the plaintiff complained about the condition of the track to the official of the defendant who had control of the tramway, who promised to have the defect repaired immediately, and in fact did so. The repair was made by plugging up the holes in the ties where the old spikes had worked loose and driving in new spikes. The plaintiff saw and knew the nature and extent of these repairs and knew also that they were temporary in character and in the nature of things but a few days at most would pass before the same trouble with the track would be renewed at that point and the same danger of derailment arise.

The foregoing facts were shown during the presentation of the plaintiff's testimony, and when he rested his case the defendant moved for a nonsuit upon the ground that "it affirmatively appears from the testimony offered and without conflict that the plaintiff was hurt through his own negligence; that his own negligence contributed to his injury, and that if the condition of this track was what he says it was, it was one of the risks that he assumed, and he cannot recover in this action." This motion for nonsuit was granted, and from the order granting the same the plaintiff appeals.

The appellant urges as his first ground for reversal that the motion for nonsuit was granted by the court upon a different ground than those upon which it was made, and in support of this contention he quotes the language of the court made use of in the course of granting the motion. In view of the fact, however, that the court by its order granted the motion for nonsuit generally it may not be contended that its order in granting the same is to be limited by the discussion which the court indulged in in the course of granting the order, and if it appears that the motion for nonsuit should have been granted upon either or both of the grounds upon which the motion for nonsuit was made, then we think that the action of the court in granting the same should be sus-

tained. An examination of the evidence convinces us that the court was not in error in granting the nonsuit upon both of the grounds upon which it was made. Without further reviewing the evidence in the case than as above set forth, it seems quite plain to this court that the plaintiff, from the time of the commencement of his employment down to the moment of the accident, was at all times perfectly familiar with the unsafe and insecure condition of the track, and particularly with its frequently recurring state of unrepair and danger at the particular point where the accident in question occurred, and that under these circumstances it must be held that in continuing in his employment with this full knowledge of its dangers he assumed the risk which arose from the aforesaid condition.

It is, however, urged that the plaintiff is to be relieved from his assumption of this risk of his employment by the fact that he called attention to the particular defect in the track a few days before his injury, and that the defendant, having undertaken to repair that defect, plaintiff was warranted in assuming that it would be properly repaired. This might be true were it not for the fact that, according to the plaintiff's testimony, he saw the repairs made and knew precisely their extent, and that they were but temporary and insufficient, and that the track at the particular point of the injury would within a few days at most be again out of order, notwithstanding its present repair. Further than this, the place upon the track where the derailment occurred was clearly within the plaintiff's line of vision while he was hauling the cars along and over that portion of the track. This being so, we think that his act in driving over this particular spot at the time of the accident in question, without employing his faculties of vision to see whether or not the track was in proper condition, was in itself an act of negligence on his part contributing to his injury and sufficient to prevent a recovery in this case.

We think, therefore, that upon both grounds the motion for nonsuit was properly granted.

The order is affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court, on January 7, 1915, and the following opinion then rendered thereon:

THE COURT.—The petition for a hearing in this court after decision in the district court of appeal of the first district is denied. In denying such hearing it is proper to say that we are not satisfied with the conclusion of the district court of appeal, that the plaintiff must be held, as matter of law, to have been guilty of negligence contributing to his injury, and we are not to be understood as approving the portion of the opinion so holding.

[Civ. No. 1366. First Appellate District.—November 9, 1914.]

W. J. PARRY, Appellant, v. AMERICAN MOTORS CALIFORNIA COMPANY (a Corporation), Respondent.

CONTRACTS—AGENCY—SALE OF AUTOMOBILES—EXCLUSIVE RIGHT OF SALE IN CERTAIN COUNTY—WHEN AGENT NOT ENTITLED TO COMMISSIONS.—Where a contract appointing an agent as exclusive selling representative of automobiles in a particular county provides for an allowance of a certain discount to the agent from the list price of the machines sold by him in his territory, and it is further provided that in the event of the principal making a sale in the territory, the agent is to receive a certain reduced commission on the sale, provided the sale is made at "regular retail prices established by the factory," but if made at a less price the commission payable to the agent shall be agreed upon specially each time in advance, the agent is not entitled to a commission on a sale made three months after the termination of his contract, where there is no intimation that the contract of purchase was entered into after the expiration of the agency with the view of affecting the question of commissions; nor is he entitled to a commission on a sale made by the principal outside his territory to a resident of the territory at a price less than the regular retail price established by the factory, where the commission was not agreed upon in advance as provided by the contract; especially where the evidence is ample to sustain the view that the agent was not the moving cause of the sale; nor does a sale made by the principal out of the county to a resident in the county come within the terms of the contract where it is not shown that the principal, in order to effect the sale, entered the territory of the agent.

ID.—SALE MADE OUT OF AGENT'S TERRITORY TO RESIDENT THEREOF—AGENT NOT ENTITLED TO COMMISSION.—In the absence of any trade usage to the contrary, an agent to whom a manufacturing concern has given the exclusive sale of its products within a given territory is not entitled to commission on a sale made by the manufacturer outside of such territory to a resident thereof.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. William M. Finch, Judge presiding.

The facts are stated in the opinion of the court.

Langan & Mendenhall, for Appellant.

Frank W. Street, and H. M. Street, for Respondent.

RICHARDS, J.—This is an action to recover two thousand four hundred dollars, and interest thereon, for commissions alleged to be due the plaintiff upon sales of automobiles.

On May 26, 1911, the San Francisco branch of the American Motors Company, by agreement in writing, appointed the plaintiff and one F. E. Romie its exclusive representatives for Alameda County, for the sale of the "American" automobile, under the terms of which appointment it is claimed that the San Francisco branch of the American Motors Company and the defendant became indebted to said Romie and plaintiff in the sum of two thousand four hundred dollars. Subsequently, and prior to the commencement of this action, defendant took over the business of the San Francisco branch of the American Motors Company and assumed all its liabilities. Prior to the commencement of this suit F. E. Romie assigned to plaintiff his interest in the alleged demands of Parry and himself against the San Francisco branch of the American Motors Company and defendant.

The findings of the trial court were against the plaintiff, and judgment accordingly went in favor of the defendant. The appeal is from the judgment and from an order denying plaintiff's motion for a new trial.

The contract upon which the action is based and which was entered into by the assignor of the defendant as party of the first part and the plaintiff and his assignor as parties of the second part, provides, among other things, as follows:

"First. We hereby appoint second parties as our exclusive selling representative for Alameda County, state of California, for the purposes of handling American cars therein, and we agree:

"Second. To allow said second parties a discount of 15% from the regular current catalogue list price for the various models of cars manufactured by the American Motors Company at Indianapolis, Indiana, said price to be F. O. B. the factory. . . .

"Fourth. In view of the fact that the above territory lies so close to San Francisco, it might be deemed expedient at times for some of the selling force of the first party to enter into said territory and make a sale therein, in which case second parties are to receive 7½% commission on said sale, provided same is made at regular retail price established by the factory. In case a sale is made at a less price the commission payable to second parties shall be agreed upon specially each time in advance of any such sale. . . .

"Seventh. To allow said second parties the privileges of selling in open territory whenever possible."

The regular retail price of the three types of cars involved here was agreed at the trial to be as follows: the 50-H. P. car, \$4,250; the 1912 model, 30-H. P. car, \$2,400, and the 1913 model, 30-H. P. car, \$2,475.

It is also admitted that the defendant and his predecessor sold to residents of Alameda County during the term of plaintiff's contract, as follows:

To Herman Hess, a 50-H. P. car, for \$3,583.95, the retail price being \$4,250; to W. S. Heywood, a 50-H. P. car, for \$2,785.32, the retail price being \$4,250; to Stanley Gaune, a 50-H. P. car, for \$3,048.13, the retail price being \$4,250; to E. L. Brock, a 30-H. P. car, for \$2,166.60, the retail price being \$2,400.

The plaintiff and his assignor also claimed to have sold Mrs. C. E. Gilman a 30-H. P. car, of the model 1913, for the regular retail price. Concerning this transaction, it seems that during the absence of Mr. Gilman from home the plaintiff called on Mrs. Gilman and had her sign a contract for the purchase of a car. When Mr. Gilman returned and learned what had occurred he told the defendant company that the contract had been entered into without his consent; that therefore he would have absolutely nothing to do with it, and that he would not

take an American car under any conditions. No car was sold to Mrs. Gilman. About three months after the termination of the plaintiff's contract, however, the defendant persuaded Mr. C. E. Gilman to buy a car. There is no intimation in the record that the contract of purchase was entered into after the expiration of the agency with the view of affecting the question of commissions.

Two cars were sold by the defendant's predecessor to Herbert Von Loan, one for \$2016.45 and the other for \$2036.55, the retail price of each being two thousand four hundred dollars. The plaintiff and his assignor had sold E. Von Loan a car prior to this sale and it was through that transaction that he became acquainted with the San Francisco concern. Thereafter, desiring to help his son, Herbert Von Loan, to establish himself in business, Von Loan and his son called at the San Francisco establishment, with the view of purchasing two cars and of getting the agency of the American car for Modoc County, where they lived. After some negotiations the cars were sold to Herbert Von Loan under his regular agency contract and paid for by his father. In any event, the Von Loans were not residents of Alameda County, and the evidence does not show that the sales were effected through the efforts of the plaintiff and his assignor.

It was stipulated at the trial of the case by counsel for the plaintiff that no agreement was made between the parties here concerned as to the commission which plaintiff and Romie should receive on account of sales of cars sold in San Francisco by defendant and his predecessor to residents of Alameda County at a price less than the regular retail price established by the factory.

Plaintiff claims that the evidence does not support the findings, and the main points argued in the briefs are: 1. Are sales made to residents of Alameda County but negotiated outside of the county within the terms of the agency? and, 2. If they are, does the contract of agency fix a commission therefor?

As to the Gilman transaction, it does not appear from the record where the sale was made, but even if it were made in Alameda County, we do not conceive how it can be held that plaintiff is entitled to recover commissions for this sale, since it clearly appears that the transaction did not occur during the life of the agency.

As to the cars sold to Von Loan, from the testimony already alluded to, it must be held that there is ample evidence to sustain the view that the agents were not the moving cause of the sale.

As to the remainder of the sales, it appears that they were made by the defendant or its predecessor at San Francisco to residents of Alameda County and for less than the regular retail price. As to these plaintiff claims that under the terms of the contract he is entitled to seven and one-half per cent commission.

The contract between the parties reserved the right to the company to enter Alameda County for the purpose of selling its cars therein, and provided that whenever its selling force should enter that territory and make sales of cars therein at the regular retail price as established by the factory, the agents should be entitled to a commission of seven and one-half per cent. The contract, however, further provides that in case a sale is made at a figure less than the regular retail price the commission payable shall be agreed upon in advance of any such sale.

The evidence as to the sale of these cars, however, shows that, although sold to residents of Alameda County, the sales were made in San Francisco. It is not shown by the plaintiff that in order to effect these sales the defendant's representatives or employees entered the territory of the plaintiff. We think, therefore, that such sales do not come within the terms of the contract, so as to entitle the plaintiff to a commission or discount thereon. This was the rule followed by the supreme court in *Haynes Automobile Co. v. Woodill Automobile Co.*, 163 Cal. 102, [40 L. R. A. (N. S.) 971, 124 Pac. 717], where it is said: "In the absence of any trade usage to the contrary, an agent to whom a manufacturing concern has given the exclusive sale of its products within a given territory is not entitled to commission on a sale made by the manufacturer outside of such territory to the resident thereof."

Similarly, in the case at bar, there is no evidence of a trade usage or that a person who has appointed an exclusive agent for a given territory is thereby prevented from dealing outside of the limits of that territory with a resident thereof.

The judgment and order are affirmed.

Lennon, P. J., and Kerrigan, J. concurred.

[Civ. No. 1377. First Appellate District.—November 9, 1914.]

WILLIAM M. HATFIELD, Appellant, v. PEOPLES WATER COMPANY (a Corporation), Respondent.

PUBLIC SERVICE CORPORATIONS—WATER RATES—EXCESSIVE CHARGE—INJUNCTION—PLEADING—INSUFFICIENT COMPLAINT—FAILURE TO ALLEGE ESTABLISHED RATES—CONCLUSION OF PLEADER.—In an action against a water company for damages and for an injunction restraining the defendant from shutting off plaintiff's water supply and prohibiting the collection of any rate whatsoever from plaintiff, based upon an alleged violation by the defendant of those constitutional provisions (Const., art. XIV, secs. 1 and 2), which prohibit the collection by a public service corporation of a rate for water in excess of that fixed by a city council, the fact of the establishment of legal rates was an indispensable element of plaintiff's cause of action, and where the complaint did not allege that the city council, subsequent to the year in which the alleged excess was charged and collected, passed a resolution announcing the rates for the succeeding years, claimed to be excessive, and it is impossible to ascertain from the allegations of the complaint what, if any, were the fixed legal rates for those years, a demurrer to the complaint was properly sustained. A general allegation that "during the last three years and more," the defendant has been attempting to collect rates in excess of the rates fixed each year, without specifying what such fixed rates were, is a mere conclusion of the pleader, which cannot be availed of to initiate and invite an issue of fact.

ID.—COLLECTION OF ILLEGAL RATES—FORFEITURE OF WORKS AND FRANCHISES DOES NOT RESULT FROM—INJUNCTION.—In such a case the complaint does not state a cause of action sufficient to support a judgment enjoining the defendant from making and collecting any water rates at all for water served to plaintiff subsequent to the alleged collection of the excess rate from the plaintiff, on the theory that the mere charging and collecting of such rates in excess of those permitted by the constitution *ipso facto* operated as a forfeiture of the works and franchises of the defendant, and that, therefore, the right thereafter to collect any rates at all should be denied the defendant.

APPEAL from a judgment of the Superior Court of Alameda County. W. H. Waste, Judge.

The facts are stated in the opinion of the court.

R. M. F. Soto, H. A. Luttrell, and Milton Shepardson, for Appellant.

McKee & Tasheira, for Respondent.

LENNON, P. J.—This is an appeal from a judgment entered in favor of the defendant after the refusal of the plaintiff to amend his complaint in compliance with an order of the court below sustaining the defendant's demurrer. Plaintiff's cause of action is based upon an alleged violation by the defendant of those constitutional provisions (Const., art. XIV, secs. 1 and 2), which prohibit the collection by a public service corporation of a rate for water in excess of that fixed by a city council. The action is for damages, and the prayer of the complaint is for an injunction restraining the defendant from shutting off the plaintiff's water supply and prohibiting the collection of any rate whatsoever from the plaintiff. The demurrer was properly sustained. The complaint in part and in substance alleges that the plaintiff is the owner of certain premises in the city of Oakland; that the city council passed a resolution fixing water rates for the year commencing July 1, 1906; that during the six months' period from July 1, 1906, to January 2, 1907, he was furnished water by the Contra Costa Water Company, the predecessor in interest of the defendant, and charged at the rate of \$2.30 per month; that by the resolution of the city council fixing water rates only \$1.69½ per month could be lawfully charged and collected, and that therefore the plaintiff had paid for water served to him during the six months mentioned an excess rate aggregating the sum of \$3.62; that subsequent to the charging and collecting of such excess rate the defendant as the successor in interest of the Contra Costa Water Company has been continuously attempting to collect "rates of compensation in excess of the rate fixed by said council each year thereafter and during the present year" and that said defendant "during the present year" threatens to and will, unless restrained, refuse to supply the plaintiff with water until he pays the rate demanded. Undoubtedly it was the duty of the defendant to furnish the plaintiff with water upon the payment or tender of the established legal rates, and clearly, therefore, the fact of the establishment of those rates was an indispensable element of the plaintiff's cause of action. It will be noted that the plaintiff's complaint does not allege that the city council, subsequent to the year in which the alleged excess was charged and collected, ever passed a resolution announcing the rates for the succeeding years, and furthermore it is impossible to ascertain from the allegations of the complaint what, if any,

were the fixed legal rates for those years. The general allegation of the complaint that "during the last three years and more" the defendant has been attempting to collect rates in excess of the rates fixed each year, without specifying what such fixed rates were, is a mere conclusion of the pleader, which cannot be availed of to initiate and invite an issue of fact. The complaint does not state a cause of action sufficient to support a judgment enjoining the defendant from making and collecting any water rate at all for water served to the plaintiff subsequent to the alleged collection of the excess rate from the plaintiff. On this phase of the case it is the plaintiff's contention that the mere charging and collecting as alleged of a rate for water in excess of the rate permitted by the constitution *ipso facto* operated as a forfeiture of the works and franchises of the defendant, and that, therefore, the right thereafter to collect any rate at all should be denied the defendant. The contention was by this court in effect decided adversely to the plaintiff in the case of *Hatfield v. Peoples Water Co.*, 25 Cal. App. 502, [144 Pac. 300], where it was held that the identical conduct complained of in the present case did not *ipso facto* operate to produce a forfeiture of the works and franchises of the defendant. If we were correct in the conclusion reached in the case cited, it follows that the complaint in the present case does not state a cause of action sufficient to support an injunction prohibiting the defendant from charging and collecting any water rate whatsoever upon the theory that its right to do so expired with the forfeiture of its franchises and works.

The judgment appealed from is affirmed.

Kerrigan, J., and Richards, J., concurred.

[Civ. No. 1879. First Appellate District.—November 9, 1914.]

**ALBERT J. ARENS, Respondent, v. UNITED RAILROADS
OF SAN FRANCISCO, Appellant.**

ACTION FOR DAMAGES—PERSONAL INJURIES—NEGLIGENCE—CONFLICTING EVIDENCE—FINDINGS CONCLUSIVE.—In this action for damages for personal injuries sustained by plaintiff as a result of a collision between his wagon, upon which he was riding at the time, and a street car of the defendant, it is held that the evidence sufficiently showed that the car at the time of the accident was proceeding at a more rapid rate down the hill toward the plaintiff in plain view and with only a limited area in which to turn aside and avoid the collision, than its operator should have gone, and hence that the finding of the trial court is justified by the proofs in the case; also that the evidence is sufficiently conflicting with respect to warning signals given or neglected to be given, to bring the case within the rule that the findings of the trial court thereon will not be disturbed on appeal.

ID.—CONTRIBUTORY NEGLIGENCE.—It is held in this action that the facts were almost exactly identical with those of the case of *O'Connor v. United Railroads of San Francisco*, 168 Cal. 43, and the law laid down by the supreme court in that case on the question of contributory negligence must be regarded as controlling.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

William M. Abbott, William M. Cannon, and Kingsley W. Cannon, for Appellant.

Sullivan & Sullivan and Theo. J. Roche, for Respondent.

RICHARDS, J.—This is an action brought to recover damages for personal injuries sustained by the plaintiff as the result of a collision between his wagon, upon which at the time the plaintiff was riding, and a street-car of the defendant being operated by its employees on Twenty-fourth Street in the city of San Francisco.

The evidence showed that on the eleventh day of October, 1906, about 2:30 o'clock in the afternoon, the plaintiff was

driving his one-horse wagon on Douglass Street in that city, and turned into and proceeded easterly along and down Twenty-fourth Street, which at that point has a considerable downward grade. The latter street was at that time in the course of improvement, and its sides were so torn up in preparation for bituminizing as to leave the only available place for driving the space occupied by the tracks of the defendant. When the plaintiff turned into Twenty-fourth Street he looked up the street and saw the car of the defendant which traverses that street standing at the top of the grade, which is also the terminus of the car line. According to the plaintiff's testimony his attention was next directed to the car by his companion, and he then observed it within about forty feet of his wagon coming rapidly down the hill. There is a conflict in the evidence as to whether any bell was rung or other signal given before the plaintiff thus observed the car, both the plaintiff and his companion asserting that they heard no such signal, while the employees in charge of the car asseverate that the usual signal was rung all the way down the hill. The plaintiff, upon discovering the approaching car, undertook to turn out sufficiently to permit it to pass, but failed or was unable to do so in time, and his wagon being struck by the car he was thrown out and injured.

Upon the trial of the case before the court without a jury the court found that the defendant was guilty of negligence in the respects averred in the complaint, and that the plaintiff was not guilty of contributory negligence, and it thereupon rendered judgment in favor of the plaintiff for the sum of two thousand dollars, from which judgment and from the order of the court denying a new trial the defendant appeals.

The first proposition insisted upon by the appellant is that the finding of the court that the defendant was guilty of negligence in approaching the plaintiff at too high a rate of speed is not sustained by the evidence in the case. Counsel for the appellant argues at some length and with much force that the evidence upon the point is not sufficiently in conflict for the application of the familiar rule. We think, however, that a careful reading of the record shows that counsel's zeal has led him into error in this respect, and that the proofs of the plaintiff show sufficiently that the car was proceeding at a more rapid rate down the hill toward the plaintiff in plain view and with only a limited area in which to turn aside and avoid

the collision, than its operator should have gone, and hence that the finding of the court in this respect is justified by the proofs in the case.

We think also that the same is true with respect to the finding as to the warning signals given or neglected to be given. There is a sufficient conflict in this respect to require the application of the rule that the finding of the trial court will not be disturbed.

The court also found in favor of the plaintiff upon the issue of contributory negligence; and upon this branch of the case counsel for both parties have presented elaborate arguments, citing many authorities dealing with the law of the road and the "last clear chance" of avoiding the collision. We are of the opinion, however, that the supreme court of this state has relieved this court of the necessity of an exhaustive review of the cases cited by respective counsel herein by its recent decision in the case of *O'Connor v. United Railroads of San Francisco*, 168 Cal. 43, [141 Pac. 809]. This was a case almost exactly identical with the case at bar and in which counsel for the respective parties were the same, and in which also practically the same line of authorities was cited and relied upon on each side. The law laid down by the supreme court as controlling that case must be regarded by this court as controlling this one in every essential particular relied upon by the appellant herein.

It follows that the judgment and order denying a new trial must be and they are hereby affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1882. First Appellate District.—November 9, 1914.]

**CHARLES WALTZ, Plaintiff, Appellant, and Respondent, v.
ANNA L. SILVERIA et al., Defendants, Cross Com-
plainants, Appellants, and Respondents.**

**PERSONAL PROPERTY—CONDITIONAL SALE—DESTRUCTION OF PROPERTY BY
FIRE—WHEN LOSS FALLS UPON VENDOR.**—In the absence of an
agreement to the contrary, the risk accompanies the title to personal
property, and where there is a mere agreement to sell, and title
therefor has not passed, the loss in case of destruction by fire falls
upon the vendor.

**ID.—CONDITIONAL SALE OF PERSONAL PROPERTY—NOTES GIVEN—PUR-
CHASE PRICE—FAILURE TO PAY—ELECTION OF REMEDIES—WAIVER.**—
Upon the failure or refusal of the purchaser under a conditional
sale of personal property to meet the payment of notes given under
the contract for the purchase price, the vendor has two remedies: he
may recover the possession of the property; or, waiving the condi-
tions of the contract, consider the sale absolute, and sue for the
balance of the purchase price as evidenced by the notes, but he
cannot have both remedies; and where he elects to proceed against
the purchaser for the purchase price he thereby exercises his option
to treat the transaction as an absolute and completed sale and must
be held to a waiver of an alternative condition of the contract to
the effect that the purchaser will upon default of the payments pro-
vided for, or "in any event," return the property in good condition.

**ID.—CONDITIONAL SALE OF FIREPROOF SAFE—DESTRUCTION BY FIRE—
ACTION FOR BALANCE OF PURCHASE PRICE—GRANTING NONSUIT
PROPER.**—In an action on promissory notes given for the balance of
the purchase price on a conditional sale of a fireproof safe, where
the contract provided that the title to the safe should remain in the
vendor until the last of the promissory notes had been paid and
that upon default in payment, the purchaser should return the safe
to the seller in good order "in any event," where the evidence shows
without conflict that the building in which the safe had been placed
by the purchaser was, without fault on his part, destroyed by fire,
and that as a result of the fire, the safe, without fault on the part
of the purchaser, was damaged to such an extent as to render it
useless for the purpose for which it was intended, purchased, and
used, the safe was destroyed within the meaning of the law, and
the court properly granted a motion for nonsuit.

**ID.—DESTRUCTION OF SAFE—SHOWING ON CROSS-EXAMINATION OF PLAIN-
TIF'S WITNESSES—NONSUIT.**—In such a case the fact that the
destruction of the safe was developed in evidence upon cross-examina-
tion of plaintiff's witnesses did not lessen its value as evidence, nor

preclude the trial court from considering it when passing upon the motion for nonsuit.

ID.—CROSS-COMPLAINT—CLAIM FOR DAMAGE TO GOODS IN SAFE—BREACH OF IMPLIED WARRANTY—PROPER GRANTING OF NEW TRIAL.—In such a case, where it was not disputed that the safe was bought and sold as a fireproof safe for the express purpose of safeguarding a stock of jewelry and that the contents of the safe were damaged by the fire that destroyed it, the burden was on the cross-complainant to prove that the cross-defendant had knowledge of the existence of latent defects in the material and construction of the safe, and in the absence of such proof a verdict of the jury in favor of the cross-complainant cannot be sustained upon the theory that it was rightfully based upon proof of the breach of the implied warranty given to a purchaser of personal property by the provisions of sections 1767 and 1769 of the Civil Code, and the trial court properly granted a new trial on this issue.

ID.—WARRANTY OF FITNESS OF PROPERTY FOR PURPOSE INTENDED—CONFLICTING EVIDENCE—ORDER GRANTING NEW TRIAL CONCLUSIVE.—While proof that the safe was destroyed and its contents damaged by fire in such a case was evidence that the safe was not absolutely fireproof, such evidence was neither controlling nor conclusive upon the issue as to whether or not the safe was reasonably fit for the purpose for which it was sold; and where expert witnesses for the cross-defendant testified in effect that the safe was reasonably fireproof, and that neither it nor any other so-called fireproof safe would undergo the fierce flames of an extraordinary fire such as occurred in the present case, without serious damage to the safe and its contents, the evidence was substantially conflicting upon the issue and an order granting a new trial will not be disturbed on appeal.

ID.—NEW TRIAL—GENERAL ORDER—CONFLICTING EVIDENCE—LACK OF ABUSE OF DISCRETION.—In the absence of an apparent abuse of discretion, it is the rule that an order granting a new trial grounded upon insufficiency of the evidence is, in the presence of a substantial conflict in the evidence, conclusive upon the appellate court.

APPEALS from a judgment of nonsuit of the Superior Court of Alameda County and from an order denying plaintiff's motion for a new trial on his first cause of action and an order granting plaintiff's motion for a new trial on defendant's cross-complaint. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

F. M. Parcels, and B. F. Griffins, for Appellant, Charles Waltz.

Mastick & Partridge, C. C. Hamilton, F. I. Lemos, and H. F. Chadbourne, for Appellants John Silveira and Anna L. Silveira.

LENNON, P. J.—The plaintiff in this action sought to recover from the defendants the sum of three hundred and fifteen dollars, alleged to be the balance due and unpaid of the purchase price of a fireproof safe which had been sold and delivered to the defendants pursuant to the terms of a contract of conditional sale. The plaintiff was nonsuited, and this appeal in part is from the judgment thereupon entered that the plaintiff take nothing by his action, and from an order denying a new trial.

The material averments of the plaintiff's complaint were admitted by the answer of the defendants; but as a special defense to the action they pleaded the destruction of the safe by fire without fault on their part.

By the terms of the contract the defendants, as part of the purchase price, gave in exchange an old safe valued at three hundred and seventy-five dollars, and paid the sum of one hundred and five dollars in cash. Thereupon the defendants, as required by the contract, executed to the plaintiff twelve promissory notes, each for the sum of thirty-five dollars, payable monthly, with interest at the rate of eight per cent per annum until paid. Only three of the notes were due and had been paid at the time of the fire. After the fire the defendants refused to pay the remaining nine notes, aggregating the sum of three hundred and fifteen dollars, upon the theory that the safe having been destroyed through no fault of theirs, the consideration for the notes had failed.

By the terms of the contract title to the safe was to remain in the plaintiff until the last of the promissory notes had been paid.

It is conceded to be the law that, in the absence of an agreement to the contrary, the risk accompanies the title to property, and that "where there is a mere agreement to sell, and title therefor has not passed, the loss falls upon the vendor." (*Potts etc. Co. v. Benedict*, 156 Cal. 322, 324, [25 L. R. A. (N. S.) 609, 104 Pac. 432].) But it is contended that the evidence adduced in support of the plaintiff's case did not show that the safe sold to the defendants had been actually destroyed; and that even if it had been destroyed the nonsuit

should not have been granted because of a covenant in the contract in controversy to return the safe to the plaintiff in good order "in any event."

Upon the failure or refusal of the defendants to meet the payment of the notes provided for in the contract, the plaintiff had one of two remedies: he might recover the possession of the safe; or, waiving the conditions of the contract, consider the sale as absolute, and sue for the balance of the purchase price as evidenced by the notes. The plaintiff could not have both remedies (*Parke etc. Co. v. White River Lumber Co.*, 101 Cal. 37, [35 Pac. 442]; *Holt Manufacturing Co. v. Ewing*, 109 Cal. 353, [42 Pac. 435]; *Muncy v. Brain*, 158 Cal. 300, [110 Pac. 945]; *Elsom v. Moore*, 11 Cal. App. 377, [105 Pac. 271]). Having elected to proceed against the defendants for the purchase price of the safe, plaintiff thereby exercised his option to treat the transaction as an absolute and completed sale. Consequently he must be held to a waiver of the alternative condition of the contract, to the effect that the defendants would upon default of the payments provided for or "in any event" return the safe in good condition.

During the presentation of the plaintiff's case the fact was developed without conflict that the building in which the safe had been placed by the defendants was, without fault on their part, destroyed by fire, and that as a result of the fire the safe, without fault on the part of the defendants, was damaged to such an extent as to render it useless for the purpose for which it was intended, purchased, and used. This being so the safe was destroyed within the meaning of the law. (*Manchester Fire Ins. Co. v. Feibelman*, 118 Ala. 308, [23 South. 759]; *Williams v. Hartford Ins. Co.*, 54 Cal. 442, [35 Am. Rep. 77]; *London etc. Ins. Co. v. Heckman*, 64 Kan. 388, [67 Pac. 879]; *Palatine Ins. Co. v. Weiss*, 109 Ky. 464, [59 S. W. 509]; *O'Keefe v. London etc. Ins. Co.*, 140 Mo. 558, [39 L. R. A. 819, 41 S. W. 922]; *Thuringia v. Mallott*, 111 Ky. 917, [55 L. R. A. 277, 64 S. W. 991].)

The destruction of the safe was a fact developed in evidence upon the cross-examination of the plaintiff's witnesses; but this did not lessen its value as evidence, nor preclude the trial court from considering it when passing upon the motion for nonsuit. The motion for nonsuit was rightfully granted.

The defendant Anna L. Silveira cross-complained against the plaintiff, and for a cause of action alleged substantially

that the safe described in the contract referred to in the plaintiff's complaint was intended and purchased for the express purpose of protecting a stock of watches and jewelry against damage by fire; that the safe was not fireproof and was not reasonably fit for the purpose for which it was sold and purchased, because of certain defects existing in the material and construction of the safe, which were unknown to the defendant and cross-complainant; that owing to the unfitness of the safe for the purpose for which it was agreed to be sold and was sold, a stock of jewelry stored therein was damaged by the fire referred to in the sum of three thousand dollars.

This phase of the case was tried with a jury under a stipulation of the parties that any evidence offered and received upon the whole case should apply to every phase of the case. A verdict for one thousand five hundred dollars was rendered in favor of the defendant and cross-complainant Anna L. Silveira. Thereafter the plaintiff and cross-defendant moved for and was granted a new trial upon this phase of the case. The defendant and cross-complainant has appealed.

The motion for a new trial of the issues involved in the cross-complaint was grounded in part upon the insufficiency of the evidence to justify the verdict. The order granting a new trial was general in its terms, and therefore we must assume that the alleged insufficiency of the evidence to support the verdict in favor of the defendant and cross-complainant appealed to and prompted the court below to grant a new trial. A general order granting a new trial will not be disturbed in the absence of a showing of an abuse of discretion. It would serve no useful purpose to detail the evidence upon which the defendant and cross-complainant relies to support the verdict. It was the defendant and cross-complainant's contention in the court below, and it is her contention here, that the safe in controversy at the time of its purchase and sale contained undisclosed latent defects in its materials and construction, and as a consequence was not reasonably fit for the purpose for which it was sold. In this behalf it will suffice to say that it was not disputed at the trial that the safe in controversy was bought and sold as a fireproof safe for the express purpose of safeguarding a stock of jewelry; and it must be conceded that the evidence adduced in support of the allegations to the cross-complaint shows without conflict that the safe was destroyed and its contents damaged by fire. The

fact that the safe was destroyed by fire in the sense that it was no longer fit for the use for which it was intended and purchased may have been some evidence of the existence of a latent defect; but the record is barren of any evidence showing or tending to show that the plaintiff and cross-defendant had any knowledge of the existence of a latent defect in the material and construction of the safe. The burden of proving that fact was at all times on the defendant and cross-complainant; and in the absence of such proof it cannot be held that the verdict of the jury was justified upon the theory that it was rightfully based upon proof of the breach of the implied warranty given to a purchaser of personal property by the provisions of sections 1767 and 1769 of the Civil Code. The case of the defendant and cross-complainant, in so far as it concerned the alleged breach of the statutory warranty, given by section 1770 of the Civil Code, that the safe was reasonably fit for the purpose for which it was sold, was rested upon proof of the fact that the safe was destroyed and its contents damaged by fire. This undoubtedly was evidence that the safe was not absolutely fireproof; but such evidence was neither controlling nor conclusive upon the issue as to whether or not the safe was reasonably fit for the purpose for which it was sold. Upon this phase of the case expert witnesses for the plaintiff and cross-defendant testified in effect that the safe in controversy was reasonably fireproof, and that neither it nor any other so-called fireproof safe could go through the fierce flames of an extraordinary fire such as occurred in the present case, without serious damage to the safe and its contents. In brief, the best that can be said for the defendant and cross-complainant is that the evidence upon the issue under discussion was in substantial conflict; and in the absence of an apparent abuse of discretion, it is the rule that an order granting a new trial grounded upon the insufficiency of the evidence is, in the presence of a substantial conflict in the evidence, conclusive upon this court. (*Domico v. Casassa*, 101 Cal. 412, [35 Pac. 1024]; *Von Schroeder v. Spreckels*, 147 Cal. 186, [81 Pac. 515]; *Estate of Everts*, 163 Cal. 449, [125 Pac. 1058].)

The judgment and orders appealed from are affirmed.

Kerrigan, J., and Richards, J., concurred.

[Crim. No. 536. First Appellate District.—November 10, 1914.]

THE PEOPLE, Respondent, v. JOHN C. SIMONS, Appellant.

CRIMINAL LAW—WEIGHT OF EVIDENCE—REMOTENESS—ADMISSIBILITY.—Remoteness may affect the weight of evidence, but it does not ordinarily affect its admissibility.

ID.—EVIDENCE—MOTIVE—IDENTITY.—In a prosecution for a crime motive may be shown where there is any doubt about the identity of the perpetrator of the offense, and may be shown generally, although not necessary in every case.

ID.—ASSAULT WITH INTENT TO MURDER—MOTIVE—ADMISSIBILITY OF EVIDENCE.—In this prosecution for an assault with intent to commit murder it is held that if there was a likelihood that the complaining witness was in any way an obstacle to the sexual gratification of the defendant, that fact might be a motive for the assault upon the complaining witness, and the evidence upon that subject was properly admitted for that purpose and also for the purpose of clearing up any doubt there might have been as to the identification of the person guilty of the assault.

ID.—ALLEGED MISCONDUCT OF DISTRICT ATTORNEY—CROSS-EXAMINATION OF DEFENDANT.—It is held in this action that there was no misconduct on the part of the district attorney sufficient to warrant particular mention, and that the cross-examination of the defendant was legitimate and within the rule.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. William H. Waste, Judge.

The facts are stated in the opinion of the court.

A. L. Frick, and Gehring & Wyman, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

THE COURT.—In this case an appeal is taken from the judgment of conviction and from the order denying defendant's motion for a new trial. The points made in support of the appeal are that certain evidence introduced by the prosecution for the purpose of showing the motive of the defendant for the commission of the crime was too remote; that the

district attorney was guilty of misconduct in his argument to the jury; and that too wide a latitude was allowed in the cross-examination of the defendant. Remoteness may affect the weight of evidence; but it does not ordinarily affect its admissibility.

We are satisfied that the evidence complained of was admissible under the general rule that motive may be shown where there is any doubt about the identity of the perpetrator of the offense; or that motive may be shown generally, although not necessary to be shown in every case. In the present case, if there was a likelihood that the complaining witness was in any way an obstacle to the sexual gratification of the defendant, that might be a motive for assaulting the complaining witness with the intent to murder him. If that be so, the testimony assigned as erroneously admitted was proper for the purpose of showing motive, and also for the purpose of clearing up any doubt there might have been as to the identification of the person guilty of the assault.

We do not think there was any misconduct on the part of the district attorney sufficient to warrant particular mention. As to the cross-examination of the defendant, we are satisfied it was legitimate and within the rule.

The judgment and order appealed from are affirmed.

A petition for a rehearing of this cause was denied by the district court of appeal on December 10, 1914, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal was denied by the supreme court on January 7, 1915.

[Crim. No. 525. First Appellate District.—November 10, 1914.]

THE PEOPLE, Respondent, v. AH FONG, Appellant.

CRIMINAL LAW—MEDICAL LAW—ACT OF 1913—CONSTITUTIONALITY OF—SUFFICIENCY OF TITLE.—The title of the act approved June 2, 1913, (Stats. 1913, p. 722), for the regulation of the practice of medicine and surgery, etc., indicates with sufficient detail its entire subject matter, and there is not in the body of the statute anything which is in conflict with its title or not included within the scope thereof, and said act is constitutional.

ID.—PROSECUTION UNDER MEDICAL ACT—SUFFICIENCY OF EVIDENCE.—It is held in this prosecution for a violation of said act that the verdict is sustained by the evidence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

William H. Schooler, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, and Louis H. Ward, for Respondent.

THE COURT.—The record shows that this is an appeal from a judgment of conviction and from an order denying the motion of the defendant for a new trial, in a case wherein the defendant was charged with violating an act for the regulation of the practice of medicine and surgery, etc., approved June 2, 1913 (Stats. 1913, p. 722).

There is no merit in the contention that the statute under which the defendant was prosecuted and convicted is unconstitutional. In our judgment, the title of the act indicates with sufficient detail the entire subject matter of the act; and we are satisfied that there is not in the body of the statute in question anything which is in conflict with its title or not included within the scope thereof.

We are also satisfied, from a reading of the entire evidence in the case, that it is sufficient to sustain the verdict and the judgment.

For these reasons the judgment and order appealed from are affirmed.

[Crim. No. 531. First Appellate District.—November 10, 1914.]

THE PEOPLE, Respondent, v. HAZEL LUX, Appellant.

CRIMINAL LAW—MURDER—EVIDENCE—POSSESSION OF PISTOL—CROSS-EXAMINATION OF DEFENDANT—WHEN PROPER.—In this prosecution for murder where the direct examination of the defendant unequivocally referred to the pistol with which it is alleged she committed the crime charged against her, and to her possession of it, prior to her going to a moving picture show, there was no error in allowing the people to cross-examine her as to what she did with the pistol prior to the shooting and where she carried it on her person, it appearing that the whole cross-examination on this point was germane to the direct examination.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

Gehring & Wyman, and A. L. Frick, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

THE COURT.—It is conceded that the evidence upon the whole case is sufficient to support the verdict; and the only point made is the alleged error in the cross-examination of the defendant. The direct examination of the defendant upon one particular point related to her possession, prior to her going to a moving picture show, of a pistol—the pistol with which it was alleged she committed the crime of murder charged against her. The direct examination unequivocally referred to this pistol and the defendant's possession of it. The court is satisfied that the cross-examination on that point was germane to the direct examination. The people were entitled to know what she did with the pistol prior to the shooting, and where she carried it on her person. There is no doubt at all in our minds but that the cross-examination on that subject was legitimate and proper and without any prejudice to the defendant; and that being the only point in the case, the judgment and order appealed from are affirmed.

[Crim. No. 515. First Appellate District.—November 10, 1914.]

THE PEOPLE, Respondent, v. C. W. McALPINE, Appellant.

CRIMINAL LAW—INTERFERING WITH ELECTRICAL WIRES—ALLEGED MISCONDUCT OF DISTRICT ATTORNEY.—In this prosecution for the crime defined by section 593 of the Penal Code, it is held that there is no merit in the claim that the district attorney was guilty of misconduct on the trial, and that while perhaps he should not have asked certain questions complained of, the record fairly shows that the questions complained of were invited by the previous questions of the counsel for defendant; and that whatever harm resulted from asking those questions was cured and condoned by the subsequent questions of defendant's counsel put to the defendant when a witness in his own behalf, which brought out very emphatically and distinctly the identical matter embraced in the questions complained of.

ID.—EVIDENCE—WHEN ERROR CURED.—It is the settled rule that error, if any, of the kind complained of is cured by the bringing out of the same subject matter by the defendant's counsel.

ID.—RIGHT OF CORPORATION TO DO BUSINESS—IDENTITY OF DEFENDANT—SUFFICIENCY OF EVIDENCE.—It is further held that the proof abundantly established the fact that the complaining corporation was authorized to do business at its location at the time of the commission of the offense and that it was so doing business under proper and legal authority; and that the evidence was sufficient to establish the fact that defendant was the perpetrator of the offense and amply supports the verdict and judgment.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

George J. McDonough, and Henry B. Lister, for Appellant.

U. S. Webb, Attorney-General, John H. Riordan, Deputy Attorney-General, and John J. Barrett, for Respondent.

THE COURT.—The defendant in this case was charged with the crime defined by section 593 of the Penal Code. He was convicted and has appealed from the judgment and order denying his motion for a new trial.

The points made in support of the appeal are the misconduct of the district attorney in asking certain questions; and that the evidence is insufficient to support the verdict and judgment.

There is no merit in the claim that the district attorney was guilty of misconduct. Perhaps he should not have asked the questions complained of, but the record shows fairly enough that the questions complained of were invited by previous questions of counsel of the defendant. Moreover, whatever harm resulted from the asking of those questions was cured and condoned by the subsequent question of counsel for the defendant, put to the defendant when a witness in his own behalf, which brought out very emphatically and distinctly the identical matter embraced in the questions complained of. It is the settled rule that error, if any, of the kind complained of is cured by the bringing out of the same subject matter by defendant's counsel.

As to the next contention, the court entertains no doubt that the proof on the part of the prosecution in the trial court abundantly establishes the fact that the complaining corporation was authorized to do business at its location at the time of the commission of the offense, and that it was so doing business under proper legal authority. It is contended that the evidence is further insufficient to establish the fact that the defendant was the perpetrator of the offense; but we are satisfied that the evidence upon the whole case, direct and circumstantial, amply supports the verdict and judgment in this respect.

For the reasons stated, the judgment and order appealed from are affirmed.

[Crim. No. 551. First Appellate District.—November 11, 1914.]

THE PEOPLE, Respondent, v. EDWARD ZERMAN, Appellant.

CRIMINAL LAW—SUFFICIENCY OF EVIDENCE.—In this prosecution it is held that the evidence was sufficient to support the verdict and judgment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

James F. Sheehan, for Appellant.

U. S. Webb, Attorney-General, John H. Riordan, Deputy Attorney-General, for Respondent.

THE COURT.—We are satisfied that the point made in this case in support of the appeal is not well taken,—namely, that the evidence is insufficient to support the verdict and judgment. From a reading and consideration of the evidence we are satisfied that the contrary is the case. The judgment and order appealed from are affirmed.

[Crim. No. 540. First Appellate District.—November 11, 1914.]

THE PEOPLE, Respondent, v. ANTONIO AMADIO, Appellant.

CRIMINAL LAW—EVIDENCE—CONTRADICTIONS AND INCONSISTENCIES—WHEN INHERENT IMPROBABILITY NOT SHOWN—CONFLICTING EVIDENCE.—Contradictions and inconsistencies in the testimony of a witness alone will not constitute inherent improbability, and where such contradictions and inconsistencies appear either in the evidence offered on behalf of the people or in the evidence adduced upon the whole case the result is only a conflict in the evidence, which does not constitute a ground for a reversal on appeal.

ID.—ALLEGED MISCONDUCT OF DISTRICT ATTORNEY—IMPEACHMENT OF WITNESS—CALLING ATTENTION TO TESTIMONY IN FORMER TRIAL.—

It is held in this prosecution that there was no prejudice or misconduct on the part of the district attorney which would justify reversal of the judgment, and that the district attorney was within his rights in attempting to impeach the defendant by calling his attention upon the second trial to his testimony given upon a prior trial.

ID.—DATE OF CRIME—VARIANCE BETWEEN INFORMATION AND PROOF—

WHEN IMMATERIAL.—The district attorney has the right to elect as to the particular transaction upon which he shall offer evidence, and where he so elects, upon the suggestion of the counsel for the defendant, to rest upon a particular transaction as the foundation of his case, in which election the counsel for the defendant acquiesces, no particular harm could come to the defendant by reason of his selecting a date different from that alleged in the information.

ID.—WHEN TIME PRIOR TO FILING INFORMATION AND WITHIN STATUTE SUFFICIENT—VARIANCE—INJURY MUST BE SHOWN.—It is the

general rule that if the act is shown to have been committed prior to the filing of the information and within the period of the statute of limitations, no complaint can be made on appeal upon the ground of variance; and even if a variance has occurred it is incumbent upon the appellant, in view of the election made, to show that he has suffered by that variance or was taken by surprise, and that injury resulted to him therefrom.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. L. S. Church, Judge presiding.

The facts are stated in the opinion of the court.

Eric G. Scudder, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

THE COURT.—We are satisfied that none of the points made in support of the appeal is sufficient to warrant a reversal. The contention that the testimony is inherently improbable is based entirely upon claimed contradictions and inconsistencies in the testimony of the prosecutrix. Contradictions and inconsistencies in the testimony of a witness alone will not constitute inherent improbability. The best that can be said in favor of the argument in support of the appeal is that there is a pronounced conflict in the testimony

offered upon behalf of the prosecution, but it is only a conflict; and whether it appear in the evidence offered on behalf of the people or in the evidence adduced upon the whole case, it will not constitute a ground in this court for a reversal of the judgment.

We see no prejudice to the defendant in the conduct of the district attorney that will justify this court in reversing the judgment. Whatever was said and done by the district attorney in the first trial of the case may or may not have been by way of trapping the defendant into an inadvertent answer; but however that may be, the district attorney was within his rights when in an attempt at impeachment he called the attention of the defendant upon the second trial of the case to his testimony given upon the prior trial.

The district attorney's references to counsel were purely personal and evidently made in the heat of battle, and we fail to see how they operated to prejudice the defendant.

With reference to the contention that the proof adduced at the trial is at variance with the allegations of the information with respect to the date of the commission of the alleged offense, we are satisfied that the district attorney had the right to elect, and did elect, upon the suggestion of the counsel for the defendant, to rest upon a particular transaction as the foundation of his case; and that the defendant through his counsel acquiesced in that election. No particular harm, therefore, came to the defendant by reason of selecting a date different from that alleged in the information. Moreover, we believe it to be the general rule that if the act is shown to have been committed prior to the filing of the information and within the period of the statute of limitations, no complaint can be made here upon the ground of a variance. Even if a variance had occurred it was incumbent upon the defendant, in view of the election made, to show that he had suffered by that variance or was taken by surprise, and that injury to him resulted therefrom.

We are satisfied from a review of the evidence, direct and circumstantial, that it is sufficient to warrant the verdict of the jury.

The judgment and order appealed from are affirmed.

[Civ. No. 1652. Second Appellate District.—November 11, 1914.]

A. J. HARTFIELD, Respondent, v. FRANK ALDERETE, Appellant.

APPEAL—ALTERNATIVE METHOD—NOTICE OF ENTRY OF JUDGMENT—

FAILURE TO SERVE—WHEN APPEAL IN TIME.—It is the service of the notice of entry of judgment which starts the sixty-day period running within which an appeal must be taken under the alternative method, and not the fact that the opposing party may have had actual notice of the entry of judgment; and where such notice is not given an appeal taken within six months after the entry of judgment is within time.

ID.—NOTICE OF ENTRY OF JUDGMENT—WRITTEN NOTICE—SECTION 953A CODE CIVIL PROCEDURE.—The notice of entry of judgment contemplated by section 953a of the Code of Civil Procedure, while not so stated, must nevertheless, under section 1010 of the Code of Civil Procedure, be a written notice.

ID.—WAIVER OF NOTICE—RECORD MUST SHOW—STAY-BOND NOT EVIDENCE OF WAIVER OF NOTICE.—While a party entitled to such a written notice may waive the same, evidence of such waiver must appear from the record; and the fact that the appellant on an appeal under the alternative method has filed a stay-bond cannot be considered as evidence of a waiver of the written notice of the entry of judgment required by section 941b of the Code of Civil Procedure.

ID.—ALTERNATIVE METHOD—FAILURE TO GIVE WRITTEN NOTICE OF ENTRY OF JUDGMENT—NOTICE OF APPEAL AND REQUEST FOR TRANSCRIPT—WHEN WITHIN TIME—DISMISSAL.—In such a case, where no written notice of entry of judgment was given, an appeal will not be dismissed on the ground that the notice of intention to appeal and request for a transcript provided for by section 953a of the Code of Civil Procedure had not been given and made within ten days after the opposing party had actual notice of the entry of judgment.

MOTION to dismiss an appeal from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

J. Marion Wright, for Appellant.

L. E. Hardy, and S. C. Schaefer, for Respondent.

SHAW, J.—Plaintiff, who is respondent, moves to dismiss the appeal upon the ground that notice thereof and request for a transcript was not filed within ten days after notice to the defendant of the entry of judgment. The appeal was taken under the alternative method. No notice of the entry of judgment was served upon defendant. After the entry of judgment defendant, as shown by the certificate of the clerk, prior to taking any steps to appeal therefrom, filed a bond the purpose of which was to stay execution of the judgment; and respondent contends that actual notice of the entry of judgment must be deemed implied from the filing of such stay-bond. The judgment was entered on July 2, 1914, and the notice of appeal was filed July 27, 1914. Section 941b of the Code of Civil Procedure, provides that such notice of appeal "may be filed at any time after the rendition of the judgment, order or decree, but the same must be filed within sixty days after notice of entry of said judgment, order or decree has been served upon the attorneys of record appearing in said cause or proceeding, provided however, that if no notice of entry of judgment be given the notice must, nevertheless, be filed, under any circumstances, not later than six months after the entry of the judgment, order or decree." Since no notice of the entry of judgment was served upon the attorneys of record for the defendant, the sixty days within which the appeal must be taken, where such service is had, did not begin to run, and the appeal having been taken prior to the giving of such notice and within six months after the entry of judgment, it follows that the appeal was taken within the time prescribed therefor. It is the service of the notice which starts the sixty days to running, and not the fact that defendant may have had actual notice of the entry of judgment. In discussing a like question in the case of *Title Insurance & Trust Co. v. California Development Co.*, 168 Cal. 397, [143 Pac. 725], it is said: "But the sixty days for taking an appeal, under section 941b, runs from and after 'notice of entry . . . has been served upon the attorneys of record . . . ' This implies, as is intimated in *Estate of Keating*, (158 Cal. 109, [110 Pac. 109]) 'that the notice contemplated is necessarily a notice in writing which may be served in the ordinary manner of serving a writing.' Parol evidence that a party knows a fact, or his written statement from which such knowledge may be inferred, is not equivalent to service upon him of written notice

of the fact." (See, also, *Foss v. Johnstone*, 158 Cal. 119, [110 Pac. 294]; and *Huntington Park Improvement Co. v. Park Land Co.*, 165 Cal. 429, [132 Pac. 760].)

Section 953a of the Code of Civil Procedure, having reference to the preparation of a transcript of the evidence in lieu of a bill of exceptions, provides that the party adopting such method in bringing up the record shall file "with the clerk of the court from whose judgment, order or decree said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or taken . . . be made up and prepared." "Said notice must be filed within ten days after notice of entry of the judgment, order or decree." One of the grounds urged by respondent for dismissal of the appeal is that this notice and request for transcript was not filed within ten days after notice to defendant of the entry of judgment; and although the appeal was taken in time it is insisted that the act of the clerk in preparing the transcript was unauthorized by reason of the fact that the request therefor was not made within ten days after defendant had actual notice of such entry. The notice of entry of the judgment contemplated by this section, while not so stated, must nevertheless, under section 1010 of the Code of Civil Procedure, be a written notice.* As stated, no written notice of entry of the judgment was at any time served. While a party entitled to written notice may waive the same, evidence of such waiver must appear from the record. (*Gardner v. Stare*, 135 Cal. 118, [67 Pac. 5]; *Mallory v. See*, 129 Cal. 356, [61 Pac. 1123].) There is nothing in either the clerk's or the reporter's transcript, disclosing any fact tending to show that appellant had any notice of the entry of judgment. The fact that prior to taking the appeal defendant filed a stay-bond is evidenced by matter *de hors* the record. The bond was a mere loose sheet of paper, performed no function whatever, and hence the act of filing it was a nullity. It cannot, in our opinion, be considered as evidence of a waiver of the written notice of the entry of judgment to which defendant was entitled.

The motion to dismiss the appeal is denied.

Conrey, P. J., and James, J., concurred.

* For modification of this statement, see case same title, 20 Cal. App. Dec. 316, decided Feb. 19, 1915.

[Crim. No. 536. First Appellate District.—November 12, 1914.]

THE PEOPLE, Respondent, v. ROBERT WEST, Appellant.

CRIMINAL LAW—RAPE—SUFFICIENCY OF EVIDENCE.—In this prosecution for rape it is held that upon the whole case the evidence does not appear to be inherently incredible and improbable and that it is sufficient to support the verdict.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

A. L. Frick, and B. J. Wyman, for Appellant.

U. S. Webb, Attorney-General, John H. Riordan, Deputy Attorney-General, for Respondent.

THE COURT.—This is an appeal by the defendant from a judgment and order denying a new trial, the conviction being for the crime of rape. In support of the appeal it is urged that the evidence is insufficient to sustain the verdict, this contention being based upon the alleged inherent improbability of the evidence.

We have read the record and considered it carefully, and are satisfied that while an argument might be made against the truthfulness of the testimony, it fails when made against its inherent probability. The mere fact that it is unusual and out of the ordinary to encounter the situation described in the record does not make it absolutely and inherently improbable. We do not see upon the whole case that the evidence is inherently incredible and improbable; on the contrary, the story in its entirety may well be true. In parts perhaps it is doubtful, and might be made the foundation of a strong argument to the jury that the complaining witness was not to be believed. That argument doubtless was made to the jury and considered by it, but such an argument cannot be considered by this court.

The judgment and order are affirmed.

[Crim. No. 535. First Appellate District.—November 12, 1914.]

THE PEOPLE, Respondent, v. MARY VAUGHN, Appellant.

CRIMINAL LAW—PLEADING—SUFFICIENCY OF INFORMATION.—In a prosecution for attempt to commit grand larceny by trick and device the information is sufficient where it follows the language of the statute.

ID.—ALLEGED MISCONDUCT OF DISTRICT ATTORNEY—WHEN NOT CONSIDERED ON APPEAL—FAILURE TO REQUEST ADMONITION TO JURY.—In such a case the district attorney is entitled in his argument to the jury to make any deduction from the evidence and to draw any inference from the testimony that in his judgment is logical, even though his comment upon the conduct and character of the defendant may be harsh; and it is the general rule that even though misconduct of the district attorney be conceded, in the absence of a request to the court to admonish the jury to pay no heed to it, complaint of the same will not be heard in the appellate court.

ID.—ATTEMPT TO COMMIT GRAND LARCENY BY TRICK AND DEVICE—SUFFICIENCY OF EVIDENCE.—Where, in such a case, if the transaction involved in the information and established in evidence at the trial had been completed to the extent of the defendant obtaining money from the complaining witness and retaining it for her own use, she would have been guilty of the crime of grand larceny by trick and device, the fact that she was prevented from the commission of the crime by any circumstances whatever does not alter the situation; and if upon the completion of the transaction she would have been guilty of the crime of grand larceny by trick and device, the evidence is sufficient to sustain the finding of the jury implied from their verdict that she was guilty of an attempt to commit grand larceny by the same means.

ID.—INFERENCES FROM EVIDENCE—INTENT—PROVINCE OF JURY.—In such a case, while the inference might be drawn from the evidence that it was the intent of the defendant to get the money of the complaining witness under the pretense that she had some secret influence and would use it and the money to procure a dismissal of the criminal prosecution then pending against the son of the complaining witness, but on the other hand, it might be fairly inferred from all the evidence that her intent was to keep the money for herself rather than to resort to any such course, the question was one for the jury to determine and not for the appellate court; and there being evidence to sustain the theory of the people upon which the case was tried and defendant convicted, the verdict must stand as far as the appellate court is concerned.

ID.—PRONOUNCEMENT OF JUDGMENT—POSTPONEMENT AT DEFENDANT'S REQUEST—FINDING OF TRIAL COURT THEREON CONCLUSIVE.—In such

a case, the contention of the defendant that a new trial should have been had because the sentence of the trial court was postponed beyond the statutory time is answered by the minutes of the trial court, which were corrected at the request of the defendant, upon the hearing of which motion evidence was taken and the court after hearing conflicting evidence ordered the minutes to be corrected to show that the postponement of the pronouncement of judgment was had at the request of defendant.

ID.—EVIDENCE—INTENT—EXHIBITION OF NOTE TO WOMEN'S CLUB.—

There was no error in such a case in excluding testimony proffered for the purpose of showing that the defendant exhibited the promissory note obtained from the complaining witness to the president of a certain women's club before any trouble concerning the transaction arose, for the purpose of rebutting the inference resulting from other testimony in the case that the defendant obtained the note for her own benefit, defendant's contention being that the note was obtained for the benefit of the club, and to be used for legitimate purposes, but there being nothing in the proffered testimony to indicate that it was the purpose and intent of the defendant to transfer the note to the president of the club, in consideration of the influence of the club to be exercised on behalf of the son of the complaining witness; especially where the testimony of the defendant herself seems to negative such an intent. Such evidence is immaterial and irrelevant and to a certain extent self serving.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

N. C. Coghlan, Gail Laughlin, and M. A. Ross for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

THE COURT.—With reference to the point made upon the sufficiency of the information, we are satisfied that the demurrer was not well taken. The information follows the language of the statute and therefore, in our judgment, is sufficient.

In regard to the alleged misconduct of the district attorney, we think that while the comment of that officer upon the conduct and character of the defendant may have been somewhat harsh, nevertheless it was apparently but a deduction

from the evidence; and this the prosecuting officer was entitled to make. He had a right to draw any inference from the testimony that in his judgment was logical. Moreover there was no request to the trial court to admonish the jury to pay no heed to the alleged misconduct. It has been the rule of this court—and we think the settled rule generally—that even though misconduct be conceded, in the absence of a request to the court to admonish the jury to pay no heed to it, complaint of the same will not be heard in this court.

Coming to the point that the evidence is insufficient to sustain the verdict, we are satisfied that if the transaction involved in the information and established in evidence at the trial had been completed to the extent of the defendant obtaining the money of the complaining witness and retaining it for her own use, she would have been guilty of the crime of grand larceny by trick and device. The fact that she was prevented from the commission of the crime by any circumstances whatever does not alter the situation; and if upon the completion of the transaction she would have been guilty of the crime of grand larceny by trick and device, then we are of the opinion that the evidence is sufficient to sustain the finding of the jury implied from their verdict that she was guilty of an attempt to commit grand larceny by the same means.

It is true that the inference might perhaps be drawn from the evidence that it was the intent of the defendant to get the money of the complaining witness under the pretense that she had some secret influence and would use it and the money to procure a dismissal of a criminal prosecution then pending against the son of the complaining witness. But on the other hand, that her intent was to keep the money for herself rather than to resort to any such course, we think may be fairly inferred from all of the evidence. True, a verdict of "not guilty" might as well have been founded upon the same evidence; but that was a question for the jury and not for this court; and if there is any evidence at all to sustain the theory suggested by the people and upon which the case was tried and the defendant convicted in the lower court, the verdict must stand as far as this court is concerned.

With reference to the contention that a new trial should be had because the sentence of the trial court was postponed beyond the statutory time, that point is answered by the ruling

of the lower court, as evidenced by the minutes of the court, and which is conclusive upon that point, particularly in view of the fact that a motion was made to correct the minutes by the defendant. Upon the hearing of that motion evidence was taken as to what was said and done by all of the parties—counsel and court—upon the matter of pronouncing judgment. The court, after hearing the evidence, in which there is some conflict, determined the motion adversely to the defendant, and in effect made an order correcting the minutes, showing that the postponement of the pronouncing of judgment was had at the request of the defendant. That being so, the point cannot be availed of upon this appeal.

Finally, complaint is made of the exclusion of certain testimony proffered for the purpose of showing that the defendant exhibited the note obtained from the complaining witness to one Miss Fairbrother, the president of the Woman's Club, before any trouble concerning the transaction arose. It is argued that such testimony, if admitted, would have tended to rebut the inference resulting from other testimony in the case, that the defendant obtained the note for her own benefit, and that if such testimony had been admitted it would have tended to show that the note was obtained for the benefit of the Woman's Political Club, and to be used for legitimate purposes. But there is nothing in the proffered testimony to indicate that it was the purpose and intent of the defendant to transfer the note to Miss Fairbrother as president of that club, in consideration of the influence of the club to be exercised on behalf of the son of the complaining witness. In other words, it is not apparent to us that the proffered testimony tended in any degree to establish the fact that the defendant's purpose and intent in procuring the note was to give it to the Woman's Club; but on the contrary, the testimony of the defendant herself would seem to negative such an intent; and if that be so, the testimony was immaterial and irrelevant, and to a certain extent a self-serving declaration. Moreover and finally, even if the testimony had been admitted, we cannot see from a reading of the entire evidence that the result would have been any different. We feel convinced from a consideration of the entire evidence that if the particular evidence, the exclusion of which is now complained of, had been admitted, the verdict might as well have been "guilty." In other words, conceding for the sake of

argument the error complained of, it did not contribute to or control the verdict.

The judgment and order appealed from are affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 11, 1915, and the following opinion then rendered thereon:

THE COURT.—In denying appellant's application for a hearing in this court, after decision by the district court of appeal for the first district, we deem it proper:

First. To again call attention to what we said in *People v. Davis*, 147 Cal. 346, [81 Pac. 718], and in *Burke v. Maze*, 10 Cal. App. 211, [101 Pac. 438, 440], as to the rule governing our action on such applications, in causes which, under the provisions of the constitution, are directly appealable to a district court of appeal, rather than to this court.

Second. To say, in regard to the discussion in the appellate court opinion of the ruling of the trial court in refusing to admit certain testimony offered, that the same does not show that error was committed in said ruling, and that our action in denying a hearing in this court is had without regard to what is said in the opinion as to the effect of said ruling upon the verdict.

Lawlor, J., having been trial judge herein, does not participate in the foregoing.

[Crim. No. 542. First Appellate District.—November 13, 1914.]

THE PEOPLE, Respondent, v. **LESLIE R. TRENT**,
Appellant.

CRIMINAL LAW—GRAND LARCENY—EVIDENCE—DEPOSITIONS—FOUNDATION FOR—DISCRETION OF COURT.—In a prosecution for grand larceny the question as to whether due diligence was shown in an effort to procure the prosecuting witness, as a foundation for admission in evidence of his deposition taken upon the preliminary examination, is largely addressed to the discretion of the trial court; and where the people relied for such showing upon returns of the sheriffs of quite a number of counties of the state, including the county which

was the last known place of residence of the desired witness, in which these officials each certified that after due search and diligent inquiry, they had been unable to find the witness, and it was further shown that a diligent search had been made for the witness in the county where the crime occurred and where the witness had been staying and had directed his letters sent, it cannot be said on appeal that the trial court abused its discretion in admitting the deposition in evidence.

ID.—FAILURE TO PRESENT CERTIFICATE OF OFFICIAL REPORTER—INSUFFICIENT OBJECTION TO EVIDENCE.—In such a case there was no error in overruling the general objection to the deposition “that the proper foundation had not been laid” without directing the attention of the court or opposing counsel to the specific defect that the certificate of the official reporter of the magistrate upon the preliminary examination who took and transcribed such deposition was not presented or admitted in evidence; where the record further discloses that this general objection was made during the course of a discussion as to the sufficiency of the preliminary showing as to due diligence in seeking to locate the missing witness and did not refer directly to the defect in the omission to produce the reporter’s certificate; especially where it appears that the certificate was in court at the time and could easily have been produced and offered if the specific objection had been made.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Frank J. Murphy, and Melvin E. Van Dine, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

THE COURT.—This is an appeal from a judgment of conviction of the defendant of grand larceny and from an order denying a new trial. The appellant urges two points upon this appeal, both of which relate to the regularity of the court’s action in admitting in evidence the deposition of the prosecuting witness taken upon the preliminary examination and without the presence of which in evidence it is conceded the defendant could not have been convicted of the alleged crime.

The first contention of the appellant is that the court erred in admitting the deposition in evidence without having the proper foundation therefor laid in a sufficient showing that the prosecuting witness could not, after due diligence, be found within the state. The people relied for such showing upon returns of the sheriffs of quite a number of counties of the state, including the county which was the last known place of residence of the desired witness, in which these officials each certified that after due search and diligent inquiry, they had been unable to find the witness. It was further shown that a diligent search had been made for the witness in San Francisco, where the crime occurred and where the witness had been staying and had directed his letters sent. We think that the question as to whether these constituted a showing of due diligence lay largely in the discretion of the trial court; and we are unable to say from this record that the court has in any way abused that discretion (*People v. Dene*, 20 Cal. App. 137, [128 Pac. 339]; *People v. Lederer*, 17 Cal. App. 369, [119 Pac. 949]).

The next and final contention of the appellant is that the deposition was improperly admitted in evidence for the reason that the amended record shows that the certificate of the official reporter of the magistrate upon the preliminary examination, who took and transcribed such deposition, was not presented or admitted in evidence, and hence that the proper foundation for the admission of the deposition itself was not laid. Our examination of the record, however, discloses that the objection of defendant's counsel to the introduction of the deposition was couched in the general form, "that the proper foundation had not been laid," without in any way directing the attention of the court or of opposing counsel to the specific defect upon which he now relies. The record further discloses that the foregoing general objection was made during the course of a discussion as to the sufficiency of the preliminary showing as to due diligence in seeking to locate the missing witness and did not refer directly to the defect in the omission to produce the reporter's certificate, which is now sought to be taken advantage of. It is further disclosed by the amended record that the said certificate of the reporter was in fact in court at the time of the trial and could easily have been produced and offered had the specific objection directing attention to its omission in evi-

dence been made. Under these circumstances, we think the objection of the defendant to the admission of the deposition without this preliminary proof was too general to be relied on here (*People v. Buckley*, 143 Cal. 375, 383, [77 Pac. 169]).

No other error appearing in the record, the judgment and order denying a new trial are affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 11, 1915.

Lawlor, J., having been trial judge herein, does not participate in the foregoing.

[Civ. No. 1649. Second Appellate District.—November 13, 1914].

J. CHAUNCEY HAYES et al., Petitioners, v. J. T. BUTLER, County Clerk and ex-officio Clerk of the Superior Court of the County of San Diego, State of California, Respondent.

PLEADING—FILING OF ANSWER AFTER DEMURRER OVERRULED—DISCRETION OF COURT—IMPOSITION OF TERMS—VALIDITY OF—SECTIONS 472 AND 473 CODE CIVIL PROCEDURE.—Under the provisions of sections 472 and 473 of the Code of Civil Procedure no question exists as to the power of the court, in the exercise of its discretion, to impose terms as a condition of answering after the expiration of the time given by law therefor; in the absence of an order granting leave so to do, defendants have no legal right to answer, and an order permitting an answer to be filed within a certain time after overruling of demurrer upon terms of payment of ten dollars to plaintiff or his attorneys by the defendants is valid.

ID.—CONSTRUCTION OF SECTION 129 CODE CIVIL PROCEDURE—SECTIONS 472 AND 473 CODE CIVIL PROCEDURE NOT REPEALED BY.—The inhibition contained in section 129 of the Code of Civil Procedure is against the making of rules imposing a charge for the filing of a pleading *allowed by law*. An answer, after the expiration of the time fixed therefor, can only be filed by virtue of an order of court made in the exercise of the discretion vested in it by the provisions of sections 472 and 473 of the Code of Civil Procedure; hence, it is not a pleading the filing of which is *allowed by law* and therefor does not fall within the provisions of section 129, under which the court is empowered to make rules not inconsistent with the laws of this state. Sections 472 and 473 provide that the court may, in the exercise of its discretion and upon such terms as may be just, permit

certain things to be done which *under the law* the party has no right as of course to do, and these sections are consistent with and are not repealed by section 129.

ID.—RULES OF COURT—DISCRETION CANNOT BE TAKEN AWAY BY.—Courts cannot make an arbitrary rule applicable alike to all cases, whereby terms are imposed as a precedent condition of filing an answer after demurrer overruled and time allowed therefor by law has expired. To do so would be to divest themselves of the exercise of that discretion in each particular case which the law, in express terms, enjoins upon them.

ID.—ORDER PERMITTING ANSWER UPON TERMS TO BE CONSIDERED IN ITS ENTIRETY—FAILURE TO MEET TERMS—DENIAL OF RIGHT.—Since the right of a defendant to answer, after the expiration of the time fixed therefor, is by virtue of an order made, such order must be construed in its entirety, and without compliance with the terms thereof it must be construed as an order of denial of the right to answer unless the condition imposed therein be complied with.

APPLICATION for Writ of Mandate originally brought in the District Court of Appeal of the Second Appellate District, to compel the County Clerk of San Diego County to file defendants' answer in an action pending in the Superior Court without the payment of ten dollars to plaintiff, as ordered by the Superior Court as a condition to the granting of leave to file the answer.

The facts are stated in the opinion of the court.

Wright & Winnek, for Petitioners.

A. J. Lee, for Respondent.

SHAW, J.—Joseph C. Hunter instituted an action in the superior court of San Diego County against petitioners, who interposed a demurrer to the complaint. This demurrer, submitted without argument, was overruled, at which time the court made an order as follows: "Defendant is permitted to answer within ten days upon terms of payment of ten (\$10) dollars to plaintiff or his attorneys." Defendants (petitioners here), without paying to plaintiff or his attorneys the sum imposed as a condition of answering, presented to the county clerk, with request that he file the same, their answer to the complaint. The clerk refused to file the answer, alleging as a reason for his refusal the fact that defendants had failed to comply with the condition prescribed in the order. Peti-

tioners ask for a writ of mandate directed to the clerk of the court requiring him to file the answer.

Section 472 of the Code of Civil Procedure, provides, among other things, that "when the demurrer to a complaint is overruled and there is no answer filed, the court may, upon such terms as may be just, allow an answer to be filed." Section 473 contains a like provision. Under this provision, no question exists as to the power of the court, in the exercise of its discretion, to impose terms as a condition of answering after the expiration of the time given by law therefor. In the absence of an order granting leave so to do, defendants had no legal right to answer. Section 129 of the Code of Civil Procedure, as amended in 1913, [Stats. 1913, p. 90], provides: "Every court of record may make rules not inconsistent with the laws of this state, for its own government and the government of its officers; but such rules shall neither impose any tax, charge or penalty upon any legal proceeding, or for filing any pleading allowed by law, nor give any allowance to any officer for services." Petitioners contend that by virtue of this section as amended, and notwithstanding the provisions of section 472, the court was without power to impose terms as a condition of permitting the answer to be filed. This contention can only be sustained upon the theory that the provisions of sections 472 and 473 cannot be reconciled with section 129, and hence the later statute works a repeal by implication of the provisions of the former. We cannot assent to this view. In addition to the provision of 472, under which the court may, after the overruling of a demurrer and the expiration of the time to answer, permit an answer to be filed upon terms, section 473, among other things, provides that the court may allow, upon such terms as may be just, an amendment to any pleading or proceeding, "and may upon like terms allow an answer to be made after the time limited by this code; and may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." The imposition of terms as a condition of doing any of these things could not be imposed if petitioners are right in their contention. Clearly, it was not the intention of the legislature to repeal such provisions.

The inhibition contained in section 129 is against the making of rules imposing a charge for the filing of a pleading *allowed by law*. An answer, after the expiration of the time fixed therefor, can only be filed by virtue of an order of court made in the exercise of the discretion vested in it by the provisions of said sections 472 and 473 (*Billesbach v. Larkey*, 161 Cal. 653, [120 Pac. 31]); hence, it is not a pleading the filing of which is *allowed by law*, and therefore does not fall within the provisions of section 129, under which the court is empowered to make rules not inconsistent with the laws of this state. Sections 472 and 473 provide that the court may, in the exercise of its discretion and upon such terms as may be just, permit certain things to be done which *under the law* the party has no right as of course to do. Courts cannot make an arbitrary rule applicable alike to all cases, whereby terms are imposed as a precedent condition of filing an answer after demurrer overruled and time allowed therefor by law has expired. To do so would be to divest themselves of the exercise of that discretion in each particular case which the law in express terms enjoins upon them.

Moreover, since the right of defendant to answer is by virtue of an order made, such order must be considered in its entirety, and without compliance with the terms thereof it must be construed, in our opinion, as an order of denial of the right to answer unless the condition imposed therein be complied with.

The writ prayed for is denied.

Conrey, P. J., and James, J., concurred.

[Crim. No. 335. Second Appellate District.—November 13, 1914.]

THE PEOPLE, Respondent, v. JAMES F. ALLISON,
Appellant.

CRIMINAL LAW—INFAMOUS CRIME AGAINST NATURE—INSUFFICIENCY OF INDICTMENT.—An indictment charging the defendant with "the infamous crime against nature, with and upon one Frank B. Love, by then and there having carnal knowledge of the body of said Frank B. Love," fails to state facts constituting a public offense in that it does not allege that Frank B. Love was a male person.

ID.—CARNAL KNOWLEDGE DEFINED.—Carnal knowledge is synonymous with and means sexual intercourse.

ID.—NAME OF COMPLAINANT—SEX CANNOT BE PRESUMED FROM—JUDICIAL KNOWLEDGE.—The name Frank is generally given to males, but it is sometimes given to females, and the court cannot take judicial knowledge of the sex of the party upon whom the crime is alleged to have been committed from the name alone. If the complainant was a female, which must be assumed, since the contrary does not appear, the defendant is merely charged with having sexual intercourse with a female which does not constitute a crime.

ID.—INDICTMENT CAPABLE OF TWO CONSTRUCTIONS—PRESUMPTION OF INNOCENCE.—While an indictment will be held sufficient where the crime is substantially alleged in the words of the statute, or their equivalent, nevertheless, if the facts stated are capable of two constructions, upon one of which the facts might be true and not constitute a crime, then it is insufficient in charging the offense. The indictment cannot be aided by presumption, since all presumptions are in favor of innocence, and if the facts stated may or may not constitute a crime, the presumption is that no crime is charged.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from an order refusing a new trial. E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

Thomas Rhodes, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

SHAW, J.—Defendant was prosecuted under section 286 of the Penal Code, which provides that "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years."

Defendant appeals from the judgment of conviction and attacks the indictment, to which he interposed a demurrer upon the ground that the facts stated in the indictment did not constitute a public offense, which was overruled. The indictment is as follows: "James F. Allison is accused by the grand jury . . . of the infamous crime against nature, committed as follows, to wit: The said James F. Allison, . . . did willfully, unlawfully and feloniously commit the infamous crime against nature with and upon one Frank B. Love, by then

and there having carnal knowledge of the body of said Frank B. Love, . . . ”

Whether Frank B. Love was a male or female person is not made to appear other than by the statement that defendant had carnal knowledge of the body of said person, an act which could not have occurred save and except upon the theory that Frank B. Love was a female. Carnal knowledge is defined in Bouvier's Law Dictionary as sexual connection. This definition is approved in *Commonwealth v. Squires*, 97 Mass. 61; *Noble v. State*, 22 Ohio St. 541, and *Macey v. State*, 66 Ark. 523, [52 S. W. 2], which hold that carnal knowledge is synonymous with and means sexual intercourse. While, therefore, the indictment accuses defendant of committing the infamous crime against nature, it states facts which preclude the idea of the commission of such crime by showing the act of defendant was sexual connection with Frank B. Love. If, therefore, Frank B. Love was a female, which we must assume, since the contrary does not appear, then the defendant is merely charged with having sexual intercourse with a female, which does not constitute a crime. As said in *People v. Carroll*, 1 Cal. App. 4, [81 Pac. 681], which is almost identical with the case at bar: "We cannot take judicial knowledge of the sex of a party upon whom the crime is alleged to have been committed from the name alone. The name Frank is generally given to males, but it is sometimes given to females." It follows that the facts stated in the indictment might be true and yet the defendant be innocent of any crime. While an indictment will be held sufficient where the crime is substantially alleged in the words of the statute, or their equivalent, nevertheless, if the facts stated are capable of two constructions upon one of which the facts might be true and not constitute a crime, then it is insufficient in charging the offense. The indictment cannot be aided by presumption, since all presumptions are in favor of innocence, and if the facts stated may or may not constitute a crime the presumption is that no crime is charged. (*People v. Terrill*, 127 Cal. 99, [59 Pac. 836].) As stated, the facts of the case are practically identical with those involved in *People v. Carroll*, 1 Cal. App. 4, [81 Pac. 681], and upon the authority thereof, as well as for the reasons given, we are constrained to hold that the indictment is insufficient in that it fails to charge defendant with the commission of a public offense.

Since under our views the judgment must, for the reasons given, be reversed, it is unnecessary to discuss other alleged errors.

The judgment and order denying defendant's motion for a new trial are reversed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1648. Second Appellate District.—November 13, 1914.]

JOHN E. COLBURN, Respondent, v. F. B. PARRETT,
Executor of the Estate of Rosa Page, Deceased, Appellant.

APPEAL—MOTION TO DISMISS—INSUFFICIENT UNDERTAKING—WAIVER.—

The giving of the undertaking on appeal prescribed in section 940 of the Code of Civil Procedure may be waived; and where the respondent in making a motion to dismiss an appeal fails to specify as a ground for dismissal the fact that no "adequate bond on appeal" was given within five days after service of the notice of appeal, as specified in the notice of motion to dismiss, it is unnecessary to consider this ground.

Id.—APPEAL FROM JUDGMENT AND ORDER DENYING NEW TRIAL—SUFFICIENCY OF NOTICE OF APPEAL.—On an appeal from a judgment and order denying a new trial the notice of appeal is sufficient which is as follows: "Notice is hereby given that T. D. Parrett, through his attorneys, Porter, Morgan & Parrot, appeals to the appellate court of the state of California from that order of the superior court denying a motion for a new trial and also from the judgment therein," which notice was signed by the attorneys for appellant and duly served upon the attorney for respondent.

Id.—STATUTES PROVIDING FOR APPEALS—LIBERAL CONSTRUCTION.—Statutes making provision in aid of appeals should be liberally interpreted.

MOTION to dismiss an appeal from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Porter, Morgan & Parrot, for Appellant.

W. C. Shelton, for Respondent.

SHAW, J.—The grounds of the motion as stated in the notice thereof are the insufficiency of the notice of appeal and the fact that appellant failed to file an “adequate bond on appeal” within five days after service of notice thereof. At the hearing of the motion this last ground was not specified as a ground for dismissal; on the contrary, respondent’s counsel expressly stated that “there is but one point, and that is the question of the sufficiency of the notice of appeal.”

The giving of the undertaking on appeal prescribed in section 940 of the Code of Civil Procedure, may be waived, and respondent’s statement in open court in connection with the fact that in making the motion the failure to give the undertaking was not specified as ground for dismissal, renders it unnecessary to consider the same.

There are two methods of taking an appeal (*Mitchell v. California etc. Steamship Co.*, 154 Cal. 731, [99 Pac. 202]): One as prescribed in section 940 of the Code of Civil Procedure the other as prescribed in section 941b. The appeal under consideration was had and taken from the judgment and an order denying appellant’s motion for a new trial made upon a bill of exceptions duly settled by the trial court; the notice of appeal being as follows: “Notice is hereby given that T. D. Parrett, through his attorneys, Porter, Morgan & Parrot, appeals to the appellate court of the state of California from that order of the superior court denying a motion for a new trial and also from the judgment therein,” signed by attorneys for appellant, which notice was duly served upon the attorney for respondent. Section 940 of the Code of Civil Procedure, provides that an appeal may be taken “by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, . . . and serving a similar notice on the adverse party, or his attorney.” Statutes making provisions in aid of appeals should be liberally interpreted, and thus construed, it was a sufficient notice of appeal as provided in section 940. The appeal does not purport to have been taken pursuant to section 941b; hence it is unnecessary to determine whether or not the notice was sufficient if tested by the provisions of that section.

The motion to dismiss is denied.

Conrey, P. J., and James, J., concurred.

[Crim. No. 273. Third Appellate District.—November 12, 1914.]

THE PEOPLE, Respondent, v. HENRY WARNER,
Appellant.

CRIMINAL LAW—BURGLARY—SUFFICIENCY OF INFORMATION—DESCRIPTION OF BUILDING.—In a prosecution for burglary, where the information alleged that the defendants "did willfully, unlawfully, feloniously and burglariously enter that certain building in the town of Guerneville, in said county, in which the United States post-office was then and there located and which building was then and there owned by Mrs. R. S. Drake, with felonious intent then and there to commit larceny," it sufficiently described the building to inform the defendant of the particular building which he was charged with having burglariously entered and to render available a plea of once in jeopardy and former conviction or acquittal in case a second prosecution for the same offense should be inaugurated against him.

Id.—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY OF.—In this prosecution for burglary it is held that while the evidence upon which the defendant was convicted was purely circumstantial, it was sufficient to support a verdict of conviction.

Id.—EVIDENCE—POSSESSION OF SMOOTH COIN—IDENTIFICATION OF—COMPARISON WITH OTHER COIN—WHEN REFUSAL TO ALLOW NOT PREJUDICIAL.—In such a case, where one of the strongest circumstances against the defendant was his possession at the time of his arrest, which occurred within a few hours after the burglary, of a smooth twenty-five cent piece, which was identified by a witness as the one which was in the rifled safe on the night of the burglary, it was not prejudicial error to refuse to permit the counsel for the defendant to show the witness another smooth twenty-five cent piece and ask him to point out the distinguishing difference, if any, between the two, as the solution of such question was one for the determination of the jury.

Id.—PRESENCE OF DEFENDANT NEAR SCENE OF CRIME IN COMPANY WITH ANOTHER.—In such a case, where the theory of the prosecution was that the crime was committed jointly by the defendant and another, it was not error to permit a witness to testify that he saw the defendant in company with the other person, who was jointly charged with him, near the scene of the crime shortly before its commission.

Id.—FINDING OF POSTAGE STAMPS NEAR SCENE OF CRIME—ERROR WITHOUT PREJUDICE.—In such a case, where it appeared that a large quantity of postage stamps, as well as money, were taken from the rifled safe, it was error to permit testimony that a witness

found two five-cent postage stamps in the early morning after the burglary on a railroad track a short distance from the town where the burglary occurred, where it was not shown that the defendant had any connection with the stamps; but such error was not prejudicial, where the other circumstances of the case, unaided by the circumstances of the finding of the stamps, were sufficient to generate in the minds of reasonable men the conviction that the defendant was, beyond a reasonable doubt, guilty of the crime charged.

ID.—IDENTIFICATION OF DEFENDANT—CONCLUSION OF ARRESTING OFFICER—WHEN REFUSAL TO STRIKE OUT NOT PREJUDICIAL.—In such a case, where the arresting officer testified that, upon going into the baggage car where the defendants were arrested, he opened the door thereof slightly and peeped through and into the passenger coach "and located the two gentlemen that I was looking for," there was no error in refusing to strike out, on motion of the defendant, the words "I was looking for," on the ground that it was equivalent to telling the jury that the defendants had committed the burglary, as the statement could not have been so understood by the jury, where the testimony of the officer showed that he had no such knowledge of the two men or their connection with the crime as would induce the jury to attach any significance to any statement by him which might be so construed as to involve a declaration or any expression of opinion by the witness that they were guilty of the charge.

ID.—POSSESSION OF "SKELETON KEY"—FAILURE TO MOVE TO STRIKE OUT.—In such a case, where the counsel for defendant, on cross-examination of the arresting officer, asked if he found any burglar's tools of any kind in possession of the accused, and the district attorney on re-direct examination asked, "You said you did not find any burglar's tools. Did you find a burglar key? A. We found a skeleton key," to which counsel for the defendant interposed: "We object to that as leading. Did he find a key?" and the witness answered "Yes, a skeleton key," and after the question had been answered counsel for defendant objected to the testimony on the ground that it was incompetent, irrelevant, and immaterial, these objections having been made after the question was answered, there was nothing before the court on which to predicate a ruling, and the remaining remedy was a motion to strike the testimony from the record; but where that was not done there is no warrant for a review by the appellate court of the error in admitting the testimony, if error it was.

APPEAL from a judgment of the Superior Court of Sonoma County. Emmett Seawell, Judge.

The facts are stated in the opinion of the court.

T. J. Butts, and Charles Peery, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant and one Joe Malone were jointly charged by an information filed in the superior court of Sonoma County with the crime of burglary. The accused demanded and were given separate trials and the defendant was convicted of the crime charged.

This appeal, supported by a transcript of the testimony duly prepared under section 1247 of the Penal Code, is presented by the defendant from the judgment.

The first point made by the defendant is that the building in which the burglary is alleged to have been committed is not so described in the information as to identify it with that definiteness necessary to the protection of the accused against a second prosecution for the identical offense which it was the intention to charge.

The information alleges that the defendants "did willfully, unlawfully, feloniously and burglariously enter that certain building in the town of Guerneville, in said county, in which the United States post-office was then and there located and which building was then and there owned by Mrs. R. S. Drake, with felonious intent then and there to commit larceny."

We think the building was thus so described in the information as to have fully informed the defendant of the particular building which he was charged with having burglariously entered and to render available a plea of once in jeopardy and former conviction or acquittal in case a second prosecution for the same offense should be inaugurated against him. Indeed, the statement that the building entered was the one in which the United States post-office at Guerneville is located would have been a sufficient description, since there is but one post-office in said town. But the description goes further by declaring that said building was owned by Mrs. R. S. Drake. The evidence confirms this allegation and further shows that the post-office was in the building owned by her. The description was clearly sufficient for all purposes. (See *People v. Edwards*, 59 Cal. 359; *People v. Bitancourt*, 74 Cal. 188, 190, [15 Pac. 744]; *People v. Main*, 114 Cal. 634, [46 Pac. 612]; *People v. Parker*, 91 Cal. 91, [27 Pac. 537]; *People v. Price*, 143 Cal. 351, [77 Pac. 73].)

The next point urged for a reversal is that the evidence is insufficient to support the verdict.

The evidence upon which the defendant was convicted was purely circumstantial, and, while it is to be conceded that it does not appear at first blush to be very strong, still, after a careful analysis of the circumstances thus developed, we are persuaded that the conclusion reached by the jury is well supported.

The facts, narratively stated, are as follows: Between the hours of 5:35 P. M. of the twentieth and 5:25 A. M. of the twenty-first day of May, 1913, the post-office at Guerneville was entered, the safe therein blown open by dynamite and its contents rifled, there having been taken therefrom \$171.07 in cash and \$1,151.75 in postage stamps. The money so taken consisted of two or three twenty-dollar pieces, a considerable lot of five-dollar pieces and a quantity of dimes and nickels. Among this money was a quarter of a dollar which had worn perfectly smooth and which had been in the possession of the postmaster for several weeks prior and up to the time of the burglary.

An inspection of the post-office premises early on the morning of May 21st, after the postmaster had discovered that the office had been burglarized, revealed the fact that the door of the building had been pried open by means of picks, which had been taken from the toolhouse of the railroad company. The safe was badly shattered from the effect of the concussion. In the post-office there were picked up from the floor something over eleven dollars in money, which had evidently been dropped by the burglars, perhaps because of their haste in getting away from the scene of their crime.

It appears that the defendant and Malone, his codefendant, were first seen in the neighborhood of Guerneville on the eighteenth day of May, 1913—two or three days previously to the commission of the crime. On that day they ate dinner at a hotel at Occidental, a small town situated several miles from Guerneville. By various persons they were thereafter seen either at Guerneville or at points near that town both before and on the day that the building was entered. On the morning of the twentieth day of May, at about the hour of 10 o'clock, they were seen lying under a tree on the roadside near a place called Rio Nido, which place is located about a mile from Guerneville. At 12 o'clock noon of the twentieth

day of May they were seen sitting in front of one of the places of business at Guerneville about a block distant from the post-office. At about fifteen minutes to 6 o'clock of the morning of the twenty-first day of May, the defendant and his companion appeared at the hotel at Occidental and there and at that time had breakfast. At about 6:40 A. M., the conductor on a narrow-gauge railroad whose trains carry passengers from Occidental to Sausalito, where the road connects with the boats for San Francisco, saw the defendant and Malone, just as the train was about to move, running from behind the depot at Occidental to catch said train. The two men boarded the train without having first purchased tickets at the depot, paying their fares to Camp Meeker, a station on the line of said road a short distance from Occidental, to the conductor. When the train reached Camp Meeker, both men alighted, one going down the track in the direction in which the train was then going. The other went in the opposite direction. The train remained at Camp Meeker for upwards of thirty-five minutes and then resumed its journey south. Both the defendant and Malone had boarded the train, the former having purchased a ticket to Fairfax and the latter a ticket to Pacheco, a small flag station, at which, the conductor testified, the train rarely ever stopped or had occasion to stop. On entering the passenger coach, the defendant took the rear seat and Malone a seat in the front part of the car, and thus they traveled until Fairfax was reached. It appears that, the sheriff's office of Marin County having previously been apprised of the burglary by the authorities of Sonoma County, a deputy sheriff of the first named county boarded the train before it arrived at Fairfax, he having been given information that two persons who were suspected of having perpetrated the crime were aboard of said train. The deputy took a position in the baggage car and, peeping "through the crack of the door," saw the two men seated in the passenger coach, as above indicated. When the train reached the Fairfax depot, the officer, having stepped into the passenger coach just before the train came to a standstill, followed the two men out of the car. Before they got off the car, the defendant, in a whisper, but so that the officer heard it, directed Malone to walk down the track. As Malone started down the track, the defendant started toward the town. Before either had taken many steps in the respective directions in which

they had started, the officer halted and proceeded to question them, asking them their names, where they came from, etc. The defendant gave his name as Lawson and at a subsequent interview with the two men Malone declared that his name was Murray. "I asked them," testified the officer, "where they boarded the train—I asked the gentleman (the defendant) where he boarded the train and he would not answer me. I asked him the second time, and he pulled a card out of his pocket—that is, a time table—and was looking over the time table. He seemed to be quite nervous. Well, he was nervous. He would not answer me at all. I asked him the second time. I says, 'How far are you going?' He says, 'I am going to San Francisco.' I says, 'What made you get off here?' He says, 'You tell me something and I will tell you something'—that is the remark he made. He did not tell me why he got off at Fairfax. . . . That train runs through to connect with the boat for San Francisco—it runs to Sausalito, which is a transfer station to San Francisco." The officer then placed the two men under arrest and conveyed them to the sheriff's office at San Rafael. There the two men were searched, and from the person of the defendant the sum of \$78.70 was taken, and upon that of Malone the sum of \$78.60 was found. Among the pieces of coin found on the defendant was a quarter of a dollar which had become perfectly smooth. No postage stamps were found in the possession of either of the two men.

Thus we have detailed all the circumstances disclosed by the evidence purporting to fasten guilt upon the defendant and upon which the jury founded their verdict of conviction.

Readily it will be observed that the strongest circumstance developed at the trial against the defendant was the fact of his possession, at the time of his arrest, which occurred within a few hours after the burglary, of the smooth two-bit piece referred to above. Mr. Duncan, the postmaster, having been shown the smooth two-bit piece taken from the defendant, testified, upon an examination of the coin, that it "was the two-bit piece that was in the safe the night of the robbery, after I locked it up. I received it from Mr. Johnson that runs the mercantile store there. He brought it in one morning and asked me if I thought it was good for stamps. I was in a hurry and told him I thought it was." He said that he placed the quarter in the post-office receipts till, where he

left the stamp money, but that, because it was "so slick," he took occasion to examine it several times while it was in his possession. He observed on the coin a little depression below the right side of the eagle, and from that mark, which was perhaps made in the milling of the piece, he felt satisfied that the coin taken from the defendant was the same smooth two-bit piece which he received from Johnson and which was in the post-office safe on the night of the robbery.

C. D. Johnson, from whom the postmaster received, under the circumstances as explained by the latter, a smooth twenty-five cent piece, testified, in part, as follows: "Q. Mr. Johnson, I show you a quarter marked people's Exhibit I for identification, *People v. Warner*. Did you ever see that quarter before? A. Yes. Q. When did you first see that? A. Oh, after the 1st of September a year ago . . . in the safe of the Guerneville Rochdale Company. (The witness was connected with said company.) . . . It remained in the safe in a little box until along about January and I took it out. There were four quarters. I took the four of them out and put them in my pocket. . . . Two of them I still have. . . . This particular quarter I gave when I went to the post-office. I asked Mr. Duncan (the postmaster) if he would take it for stamps. This occurred in February or March, perhaps February (1913). . . . I had it in my pocket over a month or six weeks. . . . I took the four quarters out (of the safe). Two of the quarters were marked. . . . Two of the coins had no mark on them. . . . This is the coin I turned over to the postmaster for postage stamps." The witness proceeded to testify that, after the robbery of the post-office, the quarter taken from the defendant's possession at the time of his arrest was exhibited to him (witness) by the sheriff of Sonoma County, and that he identified the coin as the one delivered by him to the postmaster. He said he was able to identify the coin from the fact that on its date side it was perfectly smooth, the date and the "Goddess of Liberty" being wholly obliterated, and from the further fact that on the reverse side thereof the eagle, while considerably worn, was plainly visible and that to the right and under the eagle there was a peculiar depression.

The defendant did not take the stand in his own behalf. One Robert Wall, however, testifying for him, said that he was engaged in the business of selling newspapers at a news

stand at the ferry building, in San Francisco; that he was acquainted with the defendant, who had, during the recent Portola festival in San Francisco, worked for the witness; that, on the seventeenth day of May, 1913—about four days prior to the time of the commission of the crime charged—the defendant bought a newspaper from him and in payment therefor handed the witness a five-dollar gold piece; that he (witness) in returning to the defendant the change, gave the latter, among other denominations of coin, a quarter of a dollar which had been so worn that it was perfectly smooth. The witness inspected and examined the quarter taken from the defendant and declared that he was “pretty sure that was the quarter that I gave him at that time.”

Thus it is to be noted that a conflict arises in the evidence upon the question whether the “smooth quarter” found in the possession of the accused at the time of his arrest was the one which the postmaster declared was in the safe of the post-office. While it may be conceded that the identification of a particular piece of coin is, as a general proposition, an act most difficult of accomplishment, still, in this case, it is made to appear that the particular coin whose identification was singularly vital to the determination of the ultimate issue was so peculiarly marked that in that respect it was plainly different and so removed from the ordinary coins of its denomination that the witnesses for the people, having frequently examined it, could identify it as one which they had seen and handled previously to the time at which it was found in the possession of the accused. It was, therefore, with no less propriety than as to any other question of fact in the case, with the jury to decide the truth of the controversy and so determine whether the identification of the coin by the witnesses, Duncan and Johnson, was to be accepted as correct or erroneous or of so doubtful a character as to justify its rejection. The jury evidently accredited the identification of the coin by said witnesses, and thus the fact of the possession by the defendant, so soon after the burglary, of the twenty-five cent piece in question became and constituted a circumstance which, unexplained, although not of itself sufficient to warrant a conviction, the jury were nevertheless authorized to consider, in connection with the other circumstances, such as they were, in passing upon the question of the guilt or innocence of the accused. And, whether the circumstance of

the possession of stolen property has been satisfactorily explained, is a question solely for the jury's determination.

The case, then, as to the facts, stands thus: That the defendant and his companion, Malone, strangers in and around the town of Guerneville, were engaged in loitering about that and neighboring places for several days before and on the day of or preceding that on which the burglary was committed; that neither of the men appeared to have any special business, at least of a legitimate nature, in that locality; that, early of the morning of the twenty-first day of May, and within a few hours after the burglary, they, at the town of Occidental, were seen running from behind the depot to catch a train which was about to start; that they boarded said train, without first procuring tickets, paid their fares to the conductor to Camp Meeker, a short distance from Occidental, and then alighted and departed, one going in one direction and the other in the opposite; that they again took that train and occupied seats in the coach far apart from each other, going to Fairfax, where they alighted, the defendant directing his companion to walk on down the track, while he himself started in an opposite direction and toward the business part of said town; that, upon being accosted by the officer and questioned by him as to their names, where they came from, and where they were going, the defendant betrayed nervousness, refused to answer the officer's questions as to the point at which they boarded the train and where they had been, and both gave the officer fictitious names; that the two men each had in his possession approximately the same amount of money, and that in the defendant's possession was a piece of coin which was identified as the one in the safe at the time that it was rifled.

That the circumstances as thus recapitulated strongly point to the defendant's guilt, no reasonable person will for a moment deny or even attempt to controvert. And, while the defendant was at liberty to remain mute at the trial and his silence not to be considered against him, yet the fact conspicuously stands out that none of those circumstances was controverted or its incriminatory force impeached or impaired by adversary testimony, except the single circumstance (as to which, as seen, there is no conflict in the testimony) of the finding in the possession of the defendant of a two-bit piece which corresponded in certain respects, unusual to coin, with

a piece of money of the same denomination which was shown to have been in the post-office safe at the time of the burglary. In the absence of satisfactory or any explanation of those circumstances, the jury were required to answer for themselves, by a consideration of all the circumstances together, these questions: 1. Why did the defendant and his companion conceal themselves behind the depot at Occidental, at an early hour in the morning, and then hastily take the train, as it was about to move, without first providing themselves with tickets in the usual way? 2. Why did they separate when arriving at Camp Meeker and alighting from the train and then again take the same train for Fairfax? 3. Why did they separate themselves in the coach, one taking a seat in the extreme rear of the coach and the other seating himself in the extreme forward end of the car? 4. Why, upon reaching Fairfax, did the defendant request Malone to walk on down the track and he start to go toward the business part of the town? 5. Why did they give assumed or false names to the deputy sheriff? 6. Why, if, as the defendant declared was true, they were bound for San Francisco, did they leave at Fairfax the train on which they were riding and which would have given them direct connection with the ferry boats at Sausalito for San Francisco? 7. Why did they refuse to answer the deputy sheriff when he questioned them as to the place at which they boarded the train and as to where they had been? 8. What was the occasion of the betrayal of nervousness by the defendant when first accosted and questioned by the officer? 9. What was the purpose of the two men in loitering around the neighborhood of Guerneville? Men traveling together as companions may, with perfectly righteous motives, act as the defendant and Malone acted, yet such conduct in men who, as friends, are journeying together over the country is so peculiar and unusual or so far the reverse of the ordinary demeanor of men traveling together that it is open to very serious suspicion that there is some sinister or questionable motive behind it, and when viewed by the light of other connected circumstances tending in some measure to fasten guilt of crime upon persons so demeaning themselves, it may well be expected to lead the mind from the grade of mere suspicion to that of conviction that it is actuated by a criminal purpose. And so the jury could with sound reason have viewed and presumptively did view the

actions of the defendant and his companion as thus shown by the testimony, and, as before declared, we cannot see how a court of review can justly say that their interpretation of all the circumstances, considered together and in connection with each other, as represented by their verdict is, as a matter of law, erroneous.

It is next contended that numerous prejudicial errors were committed in rulings upon the evidence. Some of these will be noticed.

Counsel for the defendant, having first shown to the witness, Duncan, another smooth quarter of a dollar than the one found on the defendant, asked him to point out the distinguishing difference, if any, between the two pieces of coin. The obvious purpose of such examination of the witness was to show, if thus it could be done, that there was nothing in the coin taken from the defendant which would enable a person to distinguish it from any other equally smooth two-bit piece. The court interrupted counsel to say that, as far as he could go in the matter of testing the ability of the witness to identify the coin in question, was to question, by proper cross-examination, the means or method whereby he assumed to be able to identify or distinguish said coin from any other like coin. The court's course in this regard is assigned as error.

While we think that the court could, without serious legal impropriety, have allowed the witness to compare the two pieces of coin and point out or, as counsel for the defendant undoubtedly expected would be the result, fail to point out, any difference between the two that would facilitate a ready distinction between them, it is clear that, strictly speaking, the ruling was not erroneous, for, after all, the question whether the two-bit piece the identification of which was of vital importance in this case was or was not in any respect different from any other smooth quarter of a dollar was one whose solution was for the jury and not for the witness. As a matter of defense, it would have been proper and competent for counsel for the defendant to have put in evidence another or other quarters of the same general appearance as that of the one taken from the defendant and thus have submitted to the determination of the jury the proposition whether the piece of coin found on the defendant could by any means or for any reason be differentiated or distinguished from the

ordinary coin of like denomination, worn smooth by use. This course counsel did not adopt.

It is urged that, inasmuch as there was presented no direct evidence of the commission of the burglary by more than one person, it was error for the court to permit a witness to testify that he saw the defendant in the company of Malone at the Monte Rio Hotel on the afternoon of May 20th. The theory of the prosecution was that the crime was committed jointly by the defendant and Malone, and upon that theory the testimony objected to was peculiarly pertinent. But even if the prosecution had proceeded upon the theory that the defendant alone committed the deed, testimony of the fact that, just prior to the burglary, he had been seen near the scene thereof in the company of another party, who was not accused or even suspected of complicity in the commission of the crime, could not possibly prejudice his rights.

It appears that, at about 6 o'clock of the morning of the twenty-first day of May, one Lincoln Stewart, while on his way to his place of employment, found two five-cent postage stamps on the railroad track between Guerneville and Monte Rio, and a short distance from the former place, and over objection by defendant, Stewart was permitted to testify to the fact of finding said stamps, and objection was also likewise but unavailing made to the admission of the stamps in evidence. The defendant was not shown to have had any connection with said stamps, and therefore, the testimony disclosing the fact that they were found as indicated could have no tendency to establish his guilt. We can conceive of no legal reason justifying the admission of the testimony. We are of the opinion, however, that the other circumstances were, unaided by the circumstance of the finding of the stamps, amply sufficient to generate in the minds of reasonable men the conviction that the defendant was, beyond a reasonable doubt, guilty of the crime charged. In other words, we are convinced that had the circumstance of the finding of the stamps been eliminated from or not brought into the record, the jury could have justly concluded from the other circumstances that the defendant was guilty. In this view of the record, the testimony objected to cannot well be held to have operated prejudicially against the accused.

The witness, Emerald, the deputy sheriff who arrested the defendant and Malone, testified that, upon going into the bag-

gage-car, he opened the door thereof slightly, peeped through and into the passenger coach and "located the two gentlemen that I was looking for." Counsel for the defendant moved to strike out the words, "I was looking for," contending that the statement of the witness as phrased by the latter "was equivalent to telling the jury that the defendant and the other man, Malone, had committed the robbery at Guerneville." The court refused to order said words stricken out. The statement could not have been so understood by the jury, since the testimony of the officer did not show that he had such knowledge of the two men or their connection with the crime as would induce the jury to attach any significance to any statement by him which might be so construed as to involve a declaration or the expression of an opinion by him that they were guilty of the charge. His testimony clearly disclosed that all that he knew about the defendant and Malone or their connection with the commission of the crime for which he arrested them was what he might have acquired through his interpretation of their actions or conduct when he placed them under arrest, and it is only reasonable to say that intelligent men would not, in the face of such testimony, pay any attention to what might be viewed, by possible construction, as an opinion of the witness that the accused were the guilty persons.

It is complained that the ruling permitting the deputy sheriff who arrested the defendant to testify that he found, among other articles, a "skeleton key" in the possession of the latter, when arrested, was erroneous and prejudicial. It may perhaps be unnecessary to explain that a "skeleton key" is a burglar's implement and is commonly known to be habitually carried by professional burglars, it being capable of opening door locks to which it had not been specially fitted. The specific objection to this testimony is, however, that, inasmuch as it was quite clearly shown that entrance into the building was effected by the prying open of the door by means of a pick and not by the use of a key, the fact that the defendant had upon his person a skeleton or burglar's key could have no pertinency to any issue in the case. But it appears that counsel for the defendant first opened up the matter objected to by asking the witness, on cross-examination, if he found any burglar's tools of any kind in the possession of the accused. On re-direct, the following question was asked

by the district attorney: "You said you did not find any burglar's tools. Did you find a burglar key? A. We found a skeleton key." Counsel for the defendant then interposed: "We object to that as leading. Did he find a key?" Answer, by witness: "Yes, a skeleton key." Subsequently, and after the question had been answered, counsel for the defendant objected to the testimony upon the ground that it was "incompetent, irrelevant and immaterial." These objections having been made after the question was answered, there was nothing before the court upon which to predicate a ruling and, therefore, no ruling was made. Counsel's remaining remedy was in a motion to strike the testimony from the record, and having failed to make such a motion, there is no warrant for a review by this court of the error in admitting the testimony, if error it was.

We have now considered herein all the assignments of error in the rulings of the court upon the evidence that we have thought merited special notice. We can see no just reason for interference with the jury's conclusion upon the ultimate question in this case, and the judgment is, therefore, affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 274. Third Appellate District.—November 18, 1914.]

THE PEOPLE, Respondent, v. JOE MALONE, Appellant.

CRIMINAL LAW — BURGLARY — SUFFICIENCY OF INFORMATION — SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.—In this prosecution for burglary it is held upon the authority of the case of *People v. Warner*, ante, p. 751, in which the defendant was jointly charged with the appellant in this case, that the information was sufficient and that the evidence was amply sufficient to support the verdict.

Id.—EVIDENCE—POSSESSION OF STOLEN PROPERTY BY DEFENDANT'S COMPANION—ADMISSIBILITY OF.—Where the evidence shows that the defendant and his companion, when seen at all, were in the company of each other from the time when they were first observed in the immediate neighborhood of the burglary up to and including the time at which they were apprehended by the arresting officer, and all the circumstances of the case independent of the possession by defendant's companion of a smooth two-bit piece, identified as the same piece of coin that was in the rifled safe at the

time of the burglary, indicated the guilt of the defendant no less than that of his companion, the fact of the finding of a part of the stolen property from the safe on defendant's companion, within a few hours after the property was taken, constituted a relevant and material circumstance against the defendant, to be accorded, however, such weight in the proof of guilt as the jury might conceive it to be entitled to after comparing and considering it with all the other circumstances in the case.

ID.—GIVING OF ASSUMED NAME—POSSESSION OF MONEY BY DEFENDANT AND COMPANION—POSSESSION OF SMOOTH COIN BY DEFENDANT'S COMPANION.—There was no error in admitting evidence that defendant's companion, when arrested, gave an assumed name to the officer, that the defendant had in his possession a certain amount of money, that upon defendant's companion was found a smooth quarter of a dollar, identified by a witness as having been in the rifled safe at the time of the burglary, and also admitting in evidence the moneys taken from both the defendant and his companion, as all those circumstances were relevant and competent against the defendant, their weight or evidentiary value being a matter for the jury to determine.

ID.—IDENTIFICATION OF DEFENDANT—FAILURE OF RESIDENTS TO IDENTIFY —CROSS-EXAMINATION.—Where it appeared that the arresting officer after the arrest and prior to the trial took the defendant and his companion to the town where the burglary occurred to ascertain whether any of the residents of that place would be able to identify them as persons whose presence at or near said town they had observed shortly anterior to the time at which the crime was committed, it was not error for the court to sustain an objection to a question of counsel for defendant on cross-examination to show that at one place to which they were taken they could not be identified, where the uncontradicted testimony of several witnesses showed that the men were in the immediate neighborhood only a few hours before the crime was committed.

ID.—EVIDENCE—SUSPICION OF SHERIFF OF PERSON OTHER THAN DEFENDANTS HAD COMMITTED CRIME—INADMISSIBILITY OF.—It was not error for the court to refuse to allow the defendant to show that the sheriff of the county, upon learning of the burglary, entertained a suspicion that a person known to him, other than the defendants, was the author of the crime, where there was nothing in the direct examination of the sheriff to justify such inquiry on cross-examination.

ID.—INSTRUCTIONS—BURDEN OF PROOF—REASONABLE DOUBT—PRESUMPTION OF INNOCENCE.—There was no error in refusing the following instruction: "The court instructs you that when all the evidence in the case is before the jury, the burden of proof remains where it started, with the prosecution," where the court instructed the jury, among other statements of law pertinent to the case that "the state must prove by competent evidence every essential ele-

ment of the crime charged, to the satisfaction of each and every juror, beyond a reasonable doubt," and further that "the law presumes every man to be innocent until his guilt is established beyond a reasonable doubt," and that "this presumption attaches at every stage of the case, and to every fact essential to a conviction."

ID.—REASONABLE DOUBT—INCORRECT FORM.—There was no error in rejecting an instruction proffered by the defendant which merely contained in effect a statement of the rule as to reasonable doubt, where the rule was fully and clearly amplified by the court in its general charge; especially where the rejected instruction was not in proper form, inasmuch as it would have told the jury that defendant's companion was the only person on trial for the alleged offense, which was not true.

ID.—THEORY OF INNOCENCE—DUTY TO ACQUIT—CIRCUMSTANTIAL EVIDENCE.—There was no error in such a case in refusing an instruction proffered by defendant that "in considering the evidence, if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendant's innocence, and if you have a reasonable doubt of his guilt, you should acquit him," where the court declared the principle substantially in the following instruction: "When circumstantial evidence is relied upon to obtain a conviction, it is not only necessary that the circumstances all concur to show that the defendant committed the crime, but that all are consistent with any other rational theory."

ID.—INSTRUCTIONS—PROPERLY REFUSED WHEN COVERED BY OTHERS.—There is no error in refusing instructions proffered by the defendant where they have been fully covered by other instructions given by the court.

APPEAL from a judgment of the Superior Court of Sonoma County. Henry C. Gesford, Judge presiding.

T. J. Butts, and Charles Peery, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant was informed against, jointly with one Henry Warner, by the district attorney of Sonoma County, for the crime of burglary, and, having been convicted of the crime so charged, prosecutes this appeal from the judgment of conviction.

An opinion in the case of the defendant's codefendant, Henry Warner (Crim. No. 273), affirming the judgment therein, was this day handed down by and filed in this court.

(*People v. Warner, ante*, p. 751, [145 Pac. 545].) As the charge against both Warner and the defendant grew out of precisely the same transaction, the general facts are, of course, the same in both cases, and, having fully stated the facts in the Warner case, it is not considered necessary to repeat them here.

The defendant in the present case makes the points that the information is fatally defective in that the description of the building alleged to have been burglarized is not sufficiently definite to apprise him of the particular building thus referred to and that the evidence is so wanting in probative power that it is incapable of upholding the verdict. Upon both these points our views are expressed in the Warner case, and we have discovered no reason for holding them to be any less untenable in this than in that case. We, therefore, hold upon the authority of the Warner case, that the information is not amenable to the criticism to which it was there and is here subjected and that the evidence is amply sufficient to support the verdict in this case.

It is argued in this case, however, that, inasmuch as none of the stolen property was found in the personal possession of Malone, as was true in the case of Warner, the evidence here discloses no circumstance whatever tending to connect the defendant with complicity in the commission of the crime. But the fact that a certain part of the stolen property was found in the possession of Warner, the defendant's alleged companion in the commission of the crime, was shown in this case, and, under all the circumstances developed against both men through the evidence in both cases, that fact, unexplained, constituted a material inculpatory circumstance against Malone. And in this case, no attempt was made, as was done in the case of Warner, to explain the latter's possession of certain of the stolen property.

As shown in the opinion in the Warner case, the two men, when seen at all, were in the company of each other from the time they were first observed in the immediate neighborhood of Guerneville up to and including the time at which they were apprehended by the deputy sheriff of Marin County. Moreover, in addition to that circumstance and the other circumstances detailed in the opinion in the Warner case, the more or less significant circumstance was developed in this case that Malone carried his money in different parts of his

clothing—"some in his coat pocket, some in his pants pocket and some pinned in his clothes in the band of his trousers," so testified the deputy sheriff who arrested the two men. In brief, all the circumstances, independent of that of the possession by Warner of a smooth two-bit piece, identified as the same piece of coin of that description that was in the safe at the time of the burglary, indicated the guilt of Malone no less than that of Warner, or, in other words, indicated, if anything at all of an incriminatory nature, so far as Malone and Warner were concerned, that the crime was the consummation of their combined or joint action. Therefore, we say, the fact of the finding of a part of the property stolen from the safe by one of the two men, within a few hours after the property was so taken, constituted a relevant and material circumstance against the other, to be accorded, however, such weight in the proof of guilt as the jury might conceive it to be entitled to after comparing and considering it with all the other circumstances in the case.

Complaint is made of the rulings whereby the following testimony was allowed to go to the jury, the defendant having objected to the same on the usual general grounds, claiming as the specific ground of his objections, that no showing was made that the burglary was committed by more than one person, viz.: 1. That Warner, when arrested, gave his name as "Lawson" to the officer making the arrest; 2. That the defendant had in his possession a certain amount of money; 3. Admitting in evidence the smooth quarter of a dollar found in the possession of Warner and above referred to; and, 4. Admitting in evidence the moneys taken from both the defendant and Warner. But the very purpose of all this testimony was to disclose to the jury circumstances tending to show that the defendant, who had all along been the companion of Warner, was implicated with the latter in the commission of the crime. Clearly, all those circumstances were relevant and competent as against the defendant. Their weight or evidentiary value was, of course, a matter whose determination was solely with the jury.

It appears that, after the arrest of the two men and prior to their trial, the sheriff took them to Guerneville to ascertain whether any of the residents of that place would be able to identify them as persons whose presence at or near said town they had observed shortly anterior to the time at which the

crime was committed, and that among the places in Guerneville to which the two men were so taken was the store of a Mr. Cobb. Counsel for the defendant asked the sheriff the following question on cross-examination: "And they could not identify them there at Cobb's?" to which question the court sustained an objection by the district attorney. It is here contended that said ruling was erroneous and prejudicial, but the contention is clearly untenable. Doubtless the sheriff could have brought the men into the presence of many of the residents of Guerneville that had never seen them prior to the time they were so brought before them, but that fact itself would not constitute proof that they were not in Guerneville on the day that the burglary was committed or the day preceding that day. The fact is that the uncontradicted testimony of several witnesses shows that the two men were seen in Guerneville and the immediate neighborhood thereof on the afternoon of the twentieth day of May, only a few hours before the crime with which they were charged was perpetrated.

Nor was it error for the court to refuse to allow the defendant to show that the sheriff of Sonoma County, upon learning of the burglary, entertained a suspicion that a character known to him as "Big Otto" was the author of the crime. It is not conceivable that the fact, if it was a fact, that the sheriff suspected some other person than the accused of having committed the crime could shed any light upon the question of the guilt or innocence of the defendant. As independent or substantive proof such testimony would obviously be incompetent in that it would involve the expression of the mere opinion of the sheriff, and there was nothing testified to by the sheriff in his direct examination which seemed to justify, on cross-examination, inquiry into the question whether he had conceived and entertained such a suspicion.

It is insisted that the court made a mistake to the serious disadvantage of the accused by rejecting the following instruction requested by him: "The court instructs you that when all the evidence in the case is before the jury, the burden of proof remains where it started, with the prosecution."

The principle thus stated was sufficiently covered by the court in its general charge to the jury. Therein the court declared to the jury, among other statements of the law pertinent to the case, that "the state must prove by competent evidence every essential element of the crime charged, to the

satisfaction of each and every juror, beyond a reasonable doubt." Thus the jury were plainly told where the burden of proof lay. Again, the court instructed them that "the law presumes every man to be innocent until his guilt is established beyond a reasonable doubt," and that "this presumption *attaches at every stage of the case*, and to every fact essential to a conviction." Very clearly, by the foregoing language, the jury were in effect instructed, not only that the burden of proof rested upon the people but that such burden there remained throughout the entire case and until a verdict was arrived at.

Instruction No. 7, proposed by the defendant and rejected by the court, merely contained, in effect, a statement of the rule as to reasonable doubt, which rule was fully and clearly amplified by the court in its general charge. Besides, the rejected instruction was not in proper form, so far as this case is concerned, inasmuch as it would, as proposed, have told the jury that "Henry Warner is the only person on trial before you for this alleged offense," which, obviously, was not true. However, as stated, the fact that the court did submit to the jury the principle therein declared is a sufficient answer to the complaint that its rejection was erroneous.

Error is assigned in the action of the court in rejecting the following instruction, requested by the defendant: "In considering the evidence, if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendant's innocence, and if you have a reasonable doubt of his guilt, you should acquit him."

The principle thus declared was substantially stated in the following given instruction: "When circumstantial evidence is relied upon to obtain a conviction, it is not only necessary that the circumstances all concur to show that the defendant committed the crime, but that all are inconsistent with any other rational theory." (See, also, given instructions Nos. 11, *supra*, 14 and 15, clerk's Trans.)

In a number of instructions given to the jury at the request of the defendant, the court fully and correctly stated the rules of law relating to the recent possession of stolen property by one accused of stealing the same, etc., and, therefore, the rejection of instruction No. 16 (p. 39, clerk's Trans.), proposed by the defendant, and covering precisely the same proposition, was not prejudicial.

Instruction No. 19, proposed by the defendant and refused by the court, is literally in the language of one of the given instructions, and its rejection was, therefore, proper.

There are no other points calling for special notice in this opinion.

The judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1392. First Appellate District.—November 16, 1914.]

A. J. MINAKER, Respondent, v. SUNSET BUILDING & REAL ESTATE COMPANY (a Corporation), Defendant; INTERURBAN REAL ESTATE COMPANY (a Corporation), et al., Appellants.

CONTRACTS—SPECIFIC PERFORMANCE—PLEADING—SUFFICIENCY OF COMPLAINT—FAIRNESS OF CONTRACT.—In a suit for specific performance of a contract for the purchase of certain land, the complaint is sufficient in its allegation that the contract is fair and equitable, and such as a court of equity will enforce, where it sets up *in haec verba* the contract itself, and states that the purchase price of the property stipulated in the contract was the fair and reasonable value of the property at the time the contract was made.

ID.—SUFFICIENCY OF COMPLAINT—WAIVER OF TERMS OF CONTRACT AS TO PAYMENT.—An objection to the allegation in the complaint in such a case that a strict compliance with that part of the contract requiring all payments of the purchase price to be made upon certain days and in certain amounts was duly waived, on the ground that it would cause a variation in the rule, and further that, since a contract in writing can only be modified by a contract in writing, the alleged waiver set forth in the complaint would be void, cannot be maintained, where it appears from the face of the complaint that whatever change in the contract was made in this respect, was a fully executed variation as between the original parties to the contract, and especially where, upon the face of the complaint, it does not appear as to whether the waiver of this particular provision of the contract was or was not in writing, the only allegation being that the terms of the contract in that respect were duly waived by the respective parties thereto.

ID.—MODIFICATION OF CONTRACT—PLEADING—ALLEGATION OF MODIFICATION—PRESUMPTION OF WRITING.—Whenever it is necessary that a contract or modification of a contract shall be in writing, and the

complaint alleges that the contract or modification of the contract was actually made and entered into between the parties, the presumption will be that the contract or modification was in writing, in the absence of an averment to the contrary.

ID.—CONTRACTS—PURCHASE OF LAND—RECORDATION—RIGHTS OF PURCHASER AS AGAINST SUBSEQUENT ENCUMBRANCES AND PURCHASERS—PAYMENTS TO ORIGINAL VENDOR—RIGHTS TO SPECIFIC PERFORMANCE.—Where a contract for the purchase of land was duly recorded and thereafter and while the purchaser was proceeding to execute the same the seller made two deeds of trust to certain parties, and later one of the parties became the purchaser of the property upon the sale thereof under these deeds of trust, whatever rights the latter or his successors in interest obtained by virtue of the deeds of trust or by the sale of the property thereunder were taken subject to the contract made with the purchaser; and the purchaser was entitled to continue to make his payments under his original contract to the original vendor instead of to the purchaser under the deeds of trust, in the absence of definite notice of the transfer of title, and when he has made full payment to the original vendor he is entitled to demand specific performance of the contract not only from the original vendor, but from all those that succeeded in interest with notice of his contract.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Franklin J. Cole, Judge presiding.

The facts are stated in the opinion of the court.

H. D. Newhouse, and Abram M. Marks, for Appellants.

J. W. Henderson, and Frank D. Macbeth, for Respondent.

THE COURT.—This is an action brought by A. J. Minaker against the Sunset Building & Real Estate Company, Interurban Real Estate Company, and Hugo D. Newhouse, for the specific performance of a contract alleged and shown to have been entered into between A. J. Minaker and the Sunset Building & Real Estate Company (or that corporation under another name), for the purchase of certain lots, a portion of a larger subdivided tract of land, for the sum of one thousand and seventy-five dollars, plaintiff alleging that he had completed and complied with the terms of that contract and that he was entitled to have his contract specifically enforced, not only against the immediate vendor named in that

contract, but also against the subsequent incumbents and purchasers, named also as defendants in this action.

The first point made by the appellants is that the complaint is defective in that it does appear sufficiently from the face of the complaint that the contract is a fair and equitable contract; or, in other words, such a contract as a court of equity will enforce. The complaint sets up *in haec verba* the contract itself, and further states that the purchase price of the property stipulated in that contract was the fair and reasonable value of the property at the time the contract was made. We think the allegation that the purchase price of the property was fair and reasonable, taken in connection with the terms of the contract and set out fully in the complaint, suffices to satisfy the statute in that respect and that the first point urged by the appellant is not well taken. (*Reese Co. v. House*, 162 Cal. 740, [124 Pac. 442].)

The point is also made upon the demurrer in the briefs of counsel that the allegation in the complaint that a strict compliance with that part of the contract requiring all payments of the purchase price to be made upon certain days and in certain amounts was duly waived by the defendant and the Sunset Building & Real Estate Company, would cause a variation in the rule which has just been announced by the court; and that further, since a contract in writing can only be modified by a contract in writing, the alleged waiver set forth in the complaint would be void. To this there are two answers; first, that it appears from the face of the complaint that whatever change in the contract was made in this respect, whatever variation was accomplished, was a fully executed variation as between the original parties to the contract; but the second and better answer is that upon the face of the complaint it does not appear as to whether the waiver of this particular provision of the contract was, or was not in writing, the only allegation being that the terms of the contract in that respect were duly waived by the respective parties thereto. The supreme court has held in a number of cases that whenever it is necessary that a contract or modification of a contract should be in writing, and the complaint alleges that the contract or modification of the contract was actually made and entered into between the parties, the presumption will be that the contract or modification was in writing in the absence of an averment to the contrary.

It is admitted that the contract between the plaintiff and the Sunset Building & Real Estate Company was duly recorded and that thereafter and while the plaintiff was proceeding to execute the same, the Sunset Building & Real Estate Company made two deeds of trust to certain parties named Newhouse and later on that Hugo D. Newhouse, one of the defendants, became the purchaser of the property upon the sale thereof under these deeds of trust. The original contracts being recorded, it follows that whatever rights the defendant Newhouse or his successors in interest—the Interurban Real Estate Company—obtained by virtue of those deeds of trust or by virtue of the sale of property thereunder, or the subsequent conveyance to the Interurban Real Estate Company, they took subject to the contract made with the plaintiff, and to their knowledge and notice of said contract, imparted by the fact of its recordation. The plaintiff continued to make payments due under his original contract to his original vendor the Sunset Building & Real Estate Company; and, with the exception of one payment of fifty dollars made to Newhouse, completed payment of his installments under his contract and thereupon demanded a deed of the property, which, being refused, he brought this action for specific performance, making all the aforesaid parties defendants to the action.

The appellants contend that the defendant Newhouse, having taken a subsequent deed of trust to the property, and having later become the owner thereof through sale under that deed, was entitled to have the subsequent payments after the date of the latter deed, made to himself rather than to the original vendor; and the appellant also contends that the evidence sufficiently shows that the plaintiff Minaker had knowledge of the rights acquired by Newhouse under these deeds of trust, under the deed of grant made in pursuance thereof; and that having such knowledge he was not entitled to continue to make his payments to the original vendor. An examination of the record, however, will show that there is a failure of proof on the part of the defendants in this respect and that the defendant Newhouse does not seem to have brought clearly home to the notice of the plaintiff, the fact of his succession to the title of the property and the claim which he now makes that he was entitled to the subsequent payment upon the installments of the purchase price.

We think that the subsequent purchaser of property, with notice of the existence of a previous contract for its sale to the original vendee, before he can claim that the payments which such vendee is to make under his contract should be made to himself, must definitely advise the original vendee of the fact of his ownership of the property and his claim to such payment; and this the defendant Newhouse does not appear from the evidence to have done. We think, therefore, that the original vendee was entitled to continue to make his payments to the Sunset Building & Real Estate Company, his original vendor, and having done so he was entitled to demand the specific performance of the contract, not only from the original vendor, but from all those that had succeeded in interest with notice of his contract, and in this respect we think that the point made by the appellant is not well taken—that the plaintiff was not entitled in this action to specific performance of his contract against the subsequent purchasers with notice of his rights.

Upon the whole, we are satisfied that the evidence of the case sustains the findings of the trial court and that there is no error in the record justifying the reversal of the case and for these reasons the judgment and order denying a new trial are affirmed.

[Civ. No. 1391. First Appellate District.—November 17, 1914.]

**CARL A. WESTERGREEN et al., Appellants, v. ALICE
B. C. BEER et al., Respondents.**

**TENANTS IN COMMON—JUDICIAL SALE OF INTEREST IN REAL PROPERTY—
RIGHT OF COTENANT TO PURCHASE.**—While the law prohibits a tenant in common from purchasing for his own benefit an outstanding encumbrance upon the common property, this rule has no application to the purchase by a tenant in common of his cotenant's interest in real property at a judicial sale.

ID.—JUDICIAL SALE—SALE BY GUARDIAN OF WARD'S INTEREST AS TENANT IN COMMON OF REAL PROPERTY—RIGHT OF COTENANT TO PURCHASE.—A sale made by the guardian of minors under order of court of the interest of the minors as tenants in common of certain real property, is a judicial sale at which the minors' cotenants are entitled to purchase the property in the absence of fraud.

ID.—ACTION TO ESTABLISH TRUST—PURCHASE OF MINORS' INTEREST IN REAL PROPERTY BY COTENANT—WHEN TRUST NOT ESTABLISHED—PLEADING.—Where certain real property was distributed to the four children of the deceased jointly under her will, two of which children were minors, and thereafter the guardian of the minors, pursuant to an order of the superior court, sold the interest of the minors in the property which was bought by one of the adult sisters of the minors, an action by the minors to establish a trust in their favor against the sister who purchased the property and to compel a reconveyance thereof upon the theory that the adult sister, being a tenant in common with the minors, was prohibited from purchasing their interest in the property, cannot be maintained, in the absence of any showing of fraud, undue influence, collusion, inadequacy of consideration or any other fact tending to show that the adult sister took advantage of her situation with reference to the property or her relationship to the minors, and a demurrer to the complaint in such a case was properly sustained.

ID.—BROTHERS AND SISTERS NOT IN FIDUCIARY RELATIONSHIP.—The mere relationship of sister and brother standing alone and by itself does not create a fiduciary relationship.

APPEAL from a judgment of the Superior Court of San Mateo County. James M. Troutt, Judge presiding.

The facts are stated in the opinion of the court.

William F. Herron, for Appellants.

Ross & Ross, for Respondents.

THE COURT.—In this action the defendants' demurrer to the plaintiffs' second amended complaint was sustained by the court below without leave to amend. Judgment was thereupon entered in favor of the defendants, from which the plaintiffs have appealed.

The grounds of the demurrer were that the complaint did not state a cause of action, and that the plaintiffs did not have legal capacity to sue.

The action was one to declare a resulting trust in certain real property, and to compel a conveyance to plaintiffs of their alleged respective interests therein, and is founded upon the following alleged facts:

Ida Danielson, the mother of the plaintiffs and of the defendant Alice E. C. Beer, died, leaving an estate consisting of certain real property in the county of San Mateo. She

left a will, which was duly admitted to probate, and, in accordance with the terms of the will, the property which is the subject of the action was distributed share and share alike to her children,—namely, the defendant Alice E. C. Beer, one Lizzie M. Westergreen, and Carl A. and John A. Westergreen, the plaintiffs. Both of the plaintiffs were then minors; and shortly after the decree of distribution was made one Crow, the public administrator of San Mateo County, was appointed their guardian by the superior court. On or about December 1, 1902, Crow, as the guardian of the estates of the said minors, filed in the superior court of San Mateo County a petition for an order of sale of the minors' interests in said property, alleging that a sale was necessary in order to prevent the state and county taxes thereon from becoming delinquent and to prevent the same from being sold for taxes. The petition was granted by the court, and the order of sale made, pursuant to which the interests of the plaintiffs in the property were sold, and at said sale were purchased for the defendant Alice E. C. Beer by her husband, who acted as her agent in the matter and who afterward conveyed the property to her by deed of gift. The sale was confirmed by the superior court, and Crow, as the guardian of the plaintiffs, executed a deed to the property to the purchaser. At the time of the sale the plaintiffs were minors, and the defendant Alice E. C. Beer was an adult.

The complaint further alleges that at the time of the sale and for some time prior thereto Alice E. C. Beer was occupying and residing upon the property in question.

It is the contention of the plaintiffs that inasmuch as said defendant, their adult sister, was a joint devisee with the plaintiffs, and had acquired her interest in the property under the terms of their mother's will (which left it to the four children share and share alike) she was therefore a tenant in common with them. This may be conceded; and likewise it may be conceded, as is contended, that the law prohibits a tenant in common from purchasing for his own benefit an outstanding encumbrance upon the common property. The rule of law in this behalf, however, has no application in our opinion to the facts pleaded in the plaintiffs' complaint. The law does not prohibit one cotenant from purchasing the interest of another tenant in common at a judicial

sale. In the early case of *Gunter v. Laffan*, 7 Cal. 589, our supreme court said that "tenants in common or partners have a right to acquire their cotenants' or copartners' interests by purchasing under an execution sale, there being nothing in their relations to forbid it"; and in *Freeman on Cotenants and Partition*, sec. 165, it is said: "The reasons which prevent a cotenant from purchasing and asserting an outstanding title do not apply with equal, and generally not with any, force against his purchasing the title of his cotenants, whether the sale be voluntary or involuntary. Unless some fraud can be shown to have been perpetrated, or some superior knowledge taken advantage of, there is no doubt that a cotenant may purchase at an execution or judicial sale the moiety of any of his companions in interest, and that he may retain and assert the title thereby acquired as fully as though he was a stranger to the judgment defendant."

The sale complained of in the present case was undoubtedly a judicial sale. That a cotenant, irrespective of the origin or mode of creating the cotenancy, is not disqualified from purchasing the interest of any of his cotenants at such a sale is supported by the following authorities: *Credle v. Baugham*, 152 N. C. 18, [136 Am. St. Rep. 787, 67 S. E. 46]; *Snell v. Harrison*, 104 Mo. 158, [16 S. W. 152]; *Peck v. Lockridge*, 97 Mo. 549, [11 S. W. 246]; *Hopper v. Hopper*, 79 Md. 400, [29 Atl. 611]; *Starkweather v. Jenner*, 216 U. S. 524, [17 Ann. Cas. 1167, 54 L. Ed. 602, 30 Sup. Ct. Rep. 382]; *Gunter v. Laffan*, 7 Cal. 589.

There is no merit in the contention that Mrs. Beer stood in a fiduciary relation to the plaintiffs because of her blood relationship to them. The mere relationship of sister and brother standing alone and by itself does not create a fiduciary relationship. (*Odell v. Moss*, 130 Cal. 352, [62 Pac. 555]; *Bacon v. Soule*, 19 Cal. App. 428, [126 Pac. 384].) It will be noted that the complaint does not aver any fraud, undue influence, collusion, inadequacy of consideration, or any other fact tending to show that defendant Alice E. C. Beer took advantage of her situation with reference to the property or her relationship to the plaintiffs.

We are of the opinion that the demurrer was properly sustained upon the ground that the complaint does not state facts sufficient to constitute a cause of action. It is therefore un-

necessary for us to decide the question as to whether or not the demurrer is well taken upon the ground that the plaintiffs did not have legal capacity to sue.

The judgment appealed from is affirmed.

[Crim. No. 544. First Appellate District.—November 17, 1914.]

THE PEOPLE, Respondent, v. CHARLES L. PRYAL,
Appellant.

CRIMINAL LAW—LIBEL—LETTER CHARGING FORGERY—ADMISSION OF UNTRUTH—EVIDENCE OF GOOD MOTIVES AND JUSTIFIABLE ENDS—WHEN PROPERLY EXCLUDED—CONCLUSIVE PRESUMPTION OF MALICIOUS AND GUILTY INTENT—SECTION 1962 CODE CIVIL PROCEDURE. In a prosecution for libel, based upon a letter written by the defendant containing a charge of forgery against an attorney, where the defendant upon the trial not only made no effort to prove the truth of the assertion, but expressly admitted the charge of forgery was untrue, the trial court properly excluded from evidence documents including certain letters which passed between himself and the attorney while the latter was acting for defendant in certain litigation, which letters and documents defendant contended were admissible as tending to show his intention in uttering the libel, and as proving it was published with good motives and justifiable ends, as the defendant, in uttering the libel, engaged in the deliberate commission of an unlawful act for the purpose of injuring another, from which, under section 1962 of the Code of Civil Procedure, a malicious and guilty intent is conclusively presumed.

Id.—STATUTORY CONSTRUCTION—SECTIONS OF CODE TO BE CONSTRUED TOGETHER.—It is a well known rule of construction that the various sections of the code are to be read together and harmonized if reasonably possible.

Id.—CONSTRUCTION OF SECTIONS 250 AND 251 PENAL CODE, AND SECTION 1962 CODE CIVIL PROCEDURE—ADMITTED FALSE PUBLICATION—INNOCENT MOTIVE—PRESUMPTION OF MALICE—EVIDENCE.—When sections 250 and 251 of the Penal Code are read together in the light of section 1962 of the Code of Civil Procedure, it is quite plain that proof of an innocent motive or intent in publishing a willful defamation, admittedly false, will not be permitted in the face of the conclusive presumption of malice which the latter section of the code creates, unless such proof shows such publication to be in the nature of a privileged communication.

Id.—EVIDENCE—DIFFICULTY BETWEEN ATTORNEY AND CLIENT.—In such a case, where the proffered evidence tended to show that difficulties

had arisen between the defendant and the attorney, over the latter's conduct during certain legal proceedings, resulting in an effort on the part of the defendant to discharge his counsel, such evidence, instead of showing that the motive for publishing the willful defamation was an innocent one, would rather tend to strengthen the presumption that the publication was inspired by ill will and was malicious.

ID.—LIBEL—RIGHT OF JURY TO DETERMINE LAW AND FACT—CONSTRUCTION OF ARTICLE I, SECTION 9 OF THE CONSTITUTION AND SECTION 251 PENAL CODE—POWER OF COURT TO RULE ON ADMISSIBILITY OF EVIDENCE NOT TAKEN AWAY.—The provisions of article I, section 9 of the state constitution and of section 251 of the Penal Code that in the trial of a case of criminal libel "the jury shall have the right to determine the law and the fact" does not take away from the court the right to rule upon the admissibility of evidence during the trial.

ID.—INSTRUCTIONS—ALLEGED MISCONDUCT OF DISTRICT ATTORNEY AND JURY.—In this prosecution for criminal libel it is held that there was no error in the instructions given by the court to the jury and that there was no misconduct on the part of either the district attorney or the jury.

APPEAL from a judgment of the Superior Court of Alameda County. Stanley A. Smith, Judge presiding.

The facts are stated in the opinion of the court.

Jacob M. Blake, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

THE COURT.—This is an appeal from a judgment of conviction in a proceeding against the defendant for a criminal libel. The alleged libel consisted in the writing of a letter by the defendant to one Isabel Abbott, containing a charge of forgery against one John A. Sands, consisting of the statement that "Sands forged both Mrs. Pryal's and my name to certain legal documents."

Upon the trial of the case the defendant Pryal not only made no effort to prove the truth of this assertion, but expressly admitted, and upon this appeal concedes, that the charge of forgery was untrue. The defendant, however, upon the trial undertook to offer in evidence a large number of documents, including certain letters which had passed be-

tween himself and said Sands while the latter was acting as his attorney in a certain litigation, which letters and documents the defendant contended were admissible as tending to show his intention in uttering this libel, and as proving that it was published with good motives and justifiable ends. The court ruled out this evidence; and it is this ruling of the court that the defendant now chiefly relies upon as error requiring a reversal upon this appeal.

We think the trial court committed no error in refusing to admit the evidence thus proffered by the defendant. The charge against the prosecuting witness of having committed the crime of forgery was made in express and unmistakable terms. That it was false the defendant admits; and that it was made and published willfully and deliberately there can be no question. The defendant was, therefore, in uttering this libel, engaged in the deliberate commission of an unlawful act for the purpose of injuring another. The Code of Civil Procedure, in enumerating those presumptions which are deemed conclusive, gives (1) a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another. (Code Civ. Proc., sec. 1962.) If this general provision of our law has application to prosecutions for criminal libel, it would necessarily follow that the proffered proof of the defendant was properly excluded by the court. The appellant, however, contends that this rule is modified in its application to trials for criminal libel, by the terms of sections 250 and 251 of the Penal Code. These sections read as follows:

"Sec. 250. An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown."

"Sec. 251. In all criminal prosecutions for libel the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. The jury have the right to determine the law and the fact."

It is a well known rule of construction that the various sections of our code are to be read together and harmonized if reasonably possible. When the foregoing sections of the Penal Code are read together in the light of section 1962 of the Code of Civil Procedure, it would seem quite plain that proof of an innocent motive or intent in publishing a

willful defamation admittedly false will not be permitted in the face of the conclusive presumption of malice which the latter section of the code creates, unless such proof shows the publication to be in the nature of a privileged communication, and that this was its nature is not contended for in this case.

It may be further said in this connection that it cannot be reasonably urged that the proofs which the defendant herein presented and which the court refused to submit to the consideration of the jury, contain within themselves any evidence tending to show that the defendant published this defamation from good motives and for justifiable ends. In point of fact the contrary would seem to be the case, for the offered proof only tended to show that difficulties had arisen between the defendant and Mr. Sands, his attorney, over the latter's conduct during certain legal proceedings, resulting in an effort on the part of the defendant to discharge his counsel. The proofs were offered for the purpose of showing that the client had cause for his dissatisfaction. This sort of evidence, instead of showing that the motive for publishing a willful defamation was an innocent one, would rather tend to strengthen the presumption that the publication was inspired by ill will and was malicious.

Counsel for appellant very strongly contends that the court in excluding this evidence has erred in a more vital respect. He urges in an elaborate brief and extended oral argument that the express provisions of the state constitution (art. I, sec. 9) and of the Penal Code (sec. 251) that in the trial of a case of criminal libel "the jury shall have the right to determine the law and the fact," takes away from the court the right to exclude any evidence from the jury which has any bearing whatever on the relation of the parties or the circumstances of the publication; and that in respect to such evidence it is the province of the jury to pass upon the law regulating its admissibility and effect at every stage of the case.

We do not understand that the foregoing provisions of the constitution and statute are to be construed as extending thus far, nor as intended to take away from the court its power and duty to pass upon the admissibility of evidence during the progress of the trial. To adopt the theory or apply the rule contended for by appellant would be to work

a revolution in our American system of procedure, and leave the judge in cases of criminal libel powerless to prevent the influx into the case of all sorts of irrelevant matter having as the only purpose of its introduction the prejudice of the minds of the jurymen to the extent of finding verdicts in favor of or against defendants in utter disregard of both the law and the facts material to the issues in the case. The supreme court of this state, in *People v. Seeley*, 139 Cal. 118, [72 Pac. 834], has laid down the rule of construction of the provision of the constitution and section of the code under review; and this court is in no position to undertake to overrule that decision and even if it were disposed—which it is not—to disagree with the views of the court as therein exhaustively set forth.

The appellant further contends that the trial court erred in the giving of certain alleged contradictory instructions relating to the power of the jury in its verdict to determine the law and the facts of the case. We do not find, however, upon an examination of the entire body of the court's instructions any sufficient contradiction to warrant a reversal of the case. Neither do we find that there was any misdirection on the part of the court or misconduct on the part of either the district attorney or of the jury in connection with the return of the latter for further instructions after some hours of deliberation upon the case. The jury apparently desired light upon the question as to what constituted a publication; and the court gave it that light by reading to it section 252 of the Penal Code.

We discover no reversible error in the record. The judgment is affirmed.

A petition for a rehearing of this cause was denied by the district court of appeal on December 17, 1914, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 14, 1915, and the following opinion then rendered thereon:

THE COURT.—The application for a hearing in this court after decision by the district court of appeal for the first district is denied. The denial of the application is not to be taken as an expression by the members of this

court to the effect that evidence tending to show that a publication complained of was published with good motives and for justifiable ends is not admissible in a criminal prosecution for libel, or as approving what was said by the district court of appeal on this proposition. Upon this question we express no opinion. It further appears on the face of the opinion of the district court of appeal that the testimony here offered was of such a nature that it would not have tended to show either that the publication was made with good motives or for justifiable ends, but, as said by the court of appeal, instead of showing that the motive for publishing the matter "was an innocent one, would rather tend to strengthen the presumption that the publication was inspired by ill will and was malicious." This statement sufficiently justifies the denial of the application.

[Civ. No. 1408. First Appellate District.—November 19, 1914.]

**SAM AFTERGUT COMPANY (a Corporation), Appellant
v. JOSEPH MULVIHILL, Respondent.**

CONTRACTS—AGREEMENT TO SELL MILK—FAILURE OF PARTY TO SIGN CONTRACT—RIGHT TO RECOVER ON QUANTUM MERUIT—ERRONEOUS NONSUIT.—Where parties orally agreed for the sale and purchase by them of a certain quantity of milk per day at a fixed price for a period of six months, and it was agreed that the contract should be reduced to writing and signed by the parties, but one of the parties never signed the contract, but delivered milk to the other for a certain period, in quantities specified in the contract, when for some reason undisclosed by the record, he refused to make further deliveries, the vendor was entitled to recover on *quantum meruit* the reasonable value of the milk delivered, and it was error for the court to grant a nonsuit.

ID.—AGREEMENT TO REDUCE CONTRACT TO WRITING AND SIGN—FAILURE TO DO SO—CONTRACT INCOMPLETE—ESTOPPEL.—In such a case, where it was the express intention of the parties that the contract should be reduced to writing and signed by them but this stipulation was not performed, the contract cannot be regarded as binding on either of the parties, especially where the proposed contract contained reciprocal covenants; nor was the vendor in such a case estopped from questioning the contract by reason of the fact that it was signed by the purchaser and left with brokers for the vendor's

signature, where the evidence does not show that the brokers were any more the agents of the vendor than of the purchaser, they merely having brought the parties together, drew up the contract, and arranged that the purchaser was to sign it, and, sometime when convenient, they were to have the vendor sign it also.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Hankins & Hankins, for Appellant.

Louis Ferrari, for Respondent.

THE COURT.—This is an appeal from a judgment in favor of the defendant and against the plaintiff upon a nonsuit granted upon motion of the defendant.

The action is one to recover the sum of \$1474, the value of milk sold and delivered by plaintiff to defendant. The facts of the case are briefly as follows: After some negotiations the parties to this action agreed orally that the plaintiff should sell and that the defendant should purchase a certain quantity of milk a day for a fixed price for a period of six months; and one of the stipulations of the oral arrangement was that the agreement thus arrived at should be reduced to writing and signed by both parties. It was accordingly reduced to writing, signed by the defendant, and left with McGuire & Son, milk brokers, to be signed by one Sam Aftergut, the president of the plaintiff corporation, some time when he should happen to be at the office of McGuire & Son. The contract, however, was never signed by Aftergut nor by any one on behalf of the plaintiff, nor is it shown that the plaintiff even knew that it had been signed by the defendant. After delivering milk to the defendant for five or six weeks in the quantity specified in the contract, the plaintiff, for some reason not disclosed by the record, refused to make further deliveries; and the defendant having failed to pay for the milk delivered, plaintiff commenced this action.

The complaint is in two counts; one for the reasonable value of the milk, and the other for the agreed price. Defendant contended in the court below and contends here that a recovery cannot be had on either count, for the reason that

if under the circumstances of the case the contract must be regarded as executed by the parties, the plaintiff cannot recover on the theory of an implied contract; and on the other hand, if the contract is to be regarded as binding on both parties, then the plaintiff, not having shown any reason for discontinuing the delivery of the milk, cannot recover on the contract.

We think the court erred in granting the motion for a nonsuit. Plaintiff never consented to the terms of the contract, nor was it even read by any of its officers; and as it was the expressed intention of the parties that it should be reduced to writing and signed by them, certain it is that this stipulation not having been performed the contract cannot be regarded as binding on either of the parties (*Spinney v. Downing*, 108 Cal. 668, [41 Pac. 797]); but, on the other hand, it having been admitted that the milk was received and used by the defendant in view of a contract to be entered into covering such delivery, and that the price claimed in the complaint was the reasonable value of the milk delivered, the plaintiff, it must be held, was entitled to recover on *quantum meruit*.

The authorities sustain the view that the oral agreement between the parties not having been reduced to writing and signed by the plaintiff as contemplated by the parties, did not constitute a contract. This is especially true where, as here, the proposed contract contained reciprocal covenants. In *Spinney v. Downing*, 108 Cal. 668, [41 Pac. 797], it appeared that the understanding and agreement between the plaintiff and the defendant was that the proposed contract should be reduced to writing and signed by both parties. This, for a reason not disclosed, was not done; and the court therefore held that it never became a binding and subsisting obligation upon either party, and in that connection said:

"It is a general rule, to which this case presents no exception, that, when it is a part of the understanding between the parties that the terms of the contract are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon, or it does not become a binding or complete contract. This is essentially true when as here the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other." (Citing cases.)

The defendant also asserts that McGuire & Son were the agents of the plaintiff, and hence he claims on some theory of estoppel that plaintiff could not be heard to say that the contract was not signed by it. But the evidence does not show that McGuire & Son were any more the agents of the plaintiff than of the defendant. They as brokers brought the plaintiff and defendant together; they drew up the contract in question, and, as arranged, the defendant was to sign it and leave it with the brokers, who, some time when convenient, would have the plaintiff sign it also. This did not constitute them the agents of the plaintiff to the extent that their possession of the contract under the circumstances of this case would be equivalent to plaintiff's possession of it, and so give rise to a question of estoppel.

The judgment is reversed.

A petition for a rehearing of this cause was denied by the district court of appeal on December 19, 1914, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 18, 1915.

[Civ. No. 1402. First Appellate District.—November 19, 1914.]

R. M. FOOTE, Respondent, v. THE SAN FRANCISCO PRODUCE COMPANY (a Corporation), Appellant.

CONTRACTS—SALE OF GRAPES—ACTION FOR BREACH OF CONTRACT—CONFLICTING EVIDENCE—FINDINGS CONCLUSIVE.—In this action for damages for an alleged breach of a written contract for the sale and purchase of a crop of grapes, where, after the acceptance of a portion of the grapes, the defendant refused to receive the balance under the contract, it is held that, as the evidence is conflicting as to the conversation had between the parties and the circumstances and terms of defendant's refusal to receive any more grapes after the first shipment, the findings of the trial court thereon in favor of the plaintiff will not be disturbed on appeal.

Id.—BREACH OF CONTRACT TO PURCHASE GRAPES—MEASURE OF DAMAGES—WHEN SECTIONS 3311 AND 3353, CIVIL CODE, NOT APPLICABLE. In such a case, where the evidence sufficiently shows that the vendor did not have time to put into effect the method prescribed by sec-

tions 3311 and 3353 of the Civil Code of fixing the amount of his damages after it was definitely known that the purchaser would not abide by his contract and accept the grapes, before the remainder of his unpicked crop had been ruined by rain and frost, and that, after they were so ruined, they had no market value which could by any diligence or effort on the part of the vendor be ascertained, as provided in said sections of the code, the purchaser was not entitled to rely upon the aforesaid sections to defeat the vendor's claim for damages.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. **K. S. Mahon**, Judge presiding.

The facts are stated in the opinion of the court.

A. L. Frick, and **Charles Quayle**, for Appellant.

Law T. Freitas, and **Thomas M. Diviny**, for Respondent.

THE COURT.—This is an appeal from a judgment and order denying the defendant's motion for a new trial in an action for damages for the alleged breach of a written contract for the sale and purchase of a crop of grapes.

The record shows that the defendant, through its duly authorized agent, visited the plaintiff's vineyard, at Linden, San Joaquin County, on October 9, 1909, and there inspected the latter's ripened crop of grapes; and thereupon and after such inspection entered into a written contract for the purchase of the entire crop, by the terms of which the buyer was to furnish the boxes, and the seller was to pick and deliver the grapes f. o. b. at Peters, a near-by station, for transportation to the defendant at its place of business in Oakland. On October 15th and 16th two car-loads of grapes were shipped from Peters to Oakland, which arrived at their destination on or about the nineteenth day of October. Thereupon a telephone communication occurred between the defendant and plaintiff, in the course of which the former told the latter not to ship any more grapes at that time. A few days later further talks over the telephone were had, as to the details of which the evidence is conflicting. The plaintiff testified that on these occasions he was demanding more boxes in which to pick and ship the grapes, and the defendant was objecting to the quality of the first two car-loads already shipped and

received, and was also instructing plaintiff not to send any more grapes until notified by the defendant so to do. The finding of the court was in favor of plaintiff's statement of the substance of these conversations, and such finding, in view of the conflict, will not be disturbed by this court.

Upon being thus advised by the defendant not to send on the rest of his crop the plaintiff ceased picking his grapes for several days, at the end of which time he received a notification from the defendant to send on more grapes. In the mean time, however, the remainder of the unpicked crop had been ruined and rendered by rain and frost unmarketable and unfit for anything but feed for hogs. The plaintiff thereupon sold the grapes on the vines for hog food, realizing only a small part of their former value, and then sued the defendant in two counts to recover the purchase price of the two carloads of grapes which had been shipped and received by the defendant, and to also recover by way of damages the contract value of the rest of the grapes less the modicum received upon their sale as hog food. Upon the trial of the cause the defendant conceded that the first two carloads of grapes were sound and merchantable, and that as to them the plaintiff was entitled to recover; but as to the rest of the grapes and the plaintiff's claim of damages for their loss, the appellant makes two main contentions:

First, that the evidence does not sustain the findings of the court in favor of the plaintiff as to the circumstances and terms of the defendant's refusal to receive any more grapes after the first shipment and before the time when it was too late to pick and save the rest of the crop. As already stated, however, the evidence is in conflict on this point, and the findings therefore will not be disturbed.

The second contention of the appellant is that this being an executory contract between plaintiff and defendant for the sale of these grapes, the defendant's liability for its breach thereof is to be arrived at and fixed under the terms of sections 3311 and 3353 of the Civil Code. These are the code sections prescribing that it is the duty of the seller of personal property, upon breach by the buyer of the contract of sale to proceed to resell the property with reasonable diligence in the nearest open market and in the manner provided for sales of pledged property, and by so doing to fix the amount of detriment caused by the buyer's breach of the contract.

This the appellant contends the plaintiff did not do; but in this respect we think the evidence sufficiently shows that the plaintiff did not have time to put into effect this method of fixing the amount of his damages after it was definitely known that the defendant would not abide by its contract and accept the grapes, and before the remainder of his unpicked grapes had been ruined by rain and frost; and that, after they were so ruined, they had no market value which could by any diligence or effort on the part of the plaintiff be so ascertained. This being so, we think the appellant was not entitled to rely upon the aforesaid sections of the Civil Code to defeat the plaintiff's claim of damages.

We further find that there is no merit in the appellant's objection to the amount of interest allowed to plaintiff by the terms of the judgment.

The judgment and order are affirmed.

A petition for a rehearing of this cause was denied by the district court of appeal on December 19, 1914, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 18, 1915.

[Civ. No. 1800. Third Appellate District.—November 19, 1914.]

H. LOWENBERG, Respondent, v. L. JACOBSON'S SONS,
Appellants.

CONTRACTS—SALE OF MERCHANDISE—ACTION FOR COMMISSIONS AGAINST NONRESIDENTS—RIGHT OF ATTACHMENT.—In an action by a sale's agent to recover commissions, where the complaint alleges that defendants are residents of the state of New York where they are engaged in the business of selling clothing and wearing apparel, and where they have their principal place of business, and each of them has been continuously absent from this state from the time of the execution of the written agreement in California, at which place plaintiff had his headquarters, and under the agreement plaintiff was to handle defendants' line of goods in certain territory, selling the same by sample on a certain percentage on all orders checked and shipped, deducting all returns, commissions to be paid from the first to the tenth of each month for the goods shipped during the previous month, and it being further alleged that during all the

time the contract was in force, there existed between the parties an open, mutual, and current account, but that defendants withheld from plaintiff commissions to which he was entitled and made erroneous charges against plaintiff; that the commissions and charges amounted to four hundred and sixty dollars in excess of all credits due defendants, the cause of action stated constitutes the legal basis for the issuance of a writ of attachment as provided by our statute, as the complaint discloses that the action was upon an express contract made in this state "for the direct payment of money," and that the defendants at the time of the beginning of the action were nonresidents of the state.

ID.—ATTACHMENT—AMOUNT DUE—CONTRACT NEED NOT SPECIFY.—In such a case it is not necessary that the contract itself should specify the total amount of money to be paid; the requirement of the statute is satisfied when the contract furnishes the measure of liability or the information from which the amount due can be ascertained. This is not at all the case of unliquidated damages for which an attachment cannot be had.

ID.—AFFIDAVIT FOR ATTACHMENT—SUFFICIENCY OF—SECTION 538, CODE CIVIL PROCEDURE.—An amended affidavit for an attachment is sufficient in such a case which avers, "That the above named defendants are and were on the 13th day of November, 1912, indebted to said plaintiff in the sum of \$460, over and above all legal set-offs and counterclaims, upon an express contract for the direct payment of money, to wit: for commissions due plaintiff from said defendants for selling and disposing of said defendants' goods; that such contract was made and executed in this state, and that the payment of the same was not and has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property; that the said defendants are and were, on the said 13th day of September 1912, nonresidents of the state of California, to wit: residents of the state of New York; that the said sum for which the attachment was and is asked and sought herein was and is an actual *bona fide* existing debt, due and owing from the said defendants to the said plaintiff; that the said attachment was and is not sought, and the said action was and is not prosecuted to hinder, delay or defraud any creditor or creditors of the said defendants, or any creditor or creditors of either of said defendants." Such affidavit exceeds the demands of section 538 of the Code of Civil Procedure, but this does not vitiate or impair it.

ID.—MOTION TO DISSOLVE ATTACHMENT—AMENDED AFFIDAVIT—FILING BEFORE DECISION OF MOTION SUFFICIENT.—There is a substantial compliance with the requirement of section 538 of the Code of Civil Procedure, permitting the filing of an amended affidavit for an attachment, where the same is filed after the submission of a motion to dissolve the attachment, but before the actual determination thereof.

ID—UNDERTAKING FOR ATTACHMENT—SUFFICIENCY OF.—In such a case, the contention that the undertaking for the attachment was insufficient in that it only imposed upon the surety an obligation for damages that might be suffered by all of the defendants collectively, and not individually by each of the defendants, cannot be maintained, where it sufficiently appears from the complaint that the action was really against only one defendant and there is no prayer for an individual judgment against the members of the association, and where the record besides does not show that any attack was made upon the amended undertaking, the notice of motion to dissolve having been addressed to the original bond, and it not affirmatively appearing that at the hearing of the motion any objection was made to the undertaking.

APPEAL from an order of the Superior Court of Alameda County refusing to dissolve an attachment. William H. Waste, Judge.

The facts are stated in the opinion of the court.

Lloyd S. Ackerman, for Appellants.

Harry C. Morrison, for Respondent.

BURNETT, J.—The appeal is from an order refusing to dissolve an attachment. The complaint set forth that the defendants are residents of the state of New York; that they are engaged in the business of selling clothing and wearing apparel to the trade; that their principal place of business is located in said state; that each of them has been continuously absent from the state from September, 1907, up to and including the month of December, 1911; "that during the month of September, 1907, said plaintiff and said defendants entered into an agreement in writing, made and executed in the state of California, whereby it was understood and agreed that said plaintiff should handle defendants' lines of goods in that territory located west of Denver, Colorado, selling the same by sample, on a basis of 7½% commission on all orders checked and shipped, deducting all returns, commissions to be paid from the first to the tenth of each month for goods shipped during the previous month; that said plaintiff's headquarters were located in the state of California; that said agreement was in full force and effect continuously from the said month of September, 1907, up to and including the month of December, 1911." Then

followed allegations that during all of said time there existed between said parties an open, mutual, and current account; that defendants had withheld from plaintiff commissions to which he was and is entitled and that erroneous charges against plaintiff had been made by defendants in said account; "that the aforesaid commissions, so withheld as aforesaid, and the charges so made and entered as aforesaid, amount to the sum of four hundred and sixty dollars, in excess of any and all credits or sums of money due, owing or coming to said defendants from said plaintiff; that said plaintiff has made many demands upon said defendants for said sum of four hundred and sixty dollars, but that said defendants have refused, failed and neglected to pay to said plaintiff said sum of four hundred and sixty dollars . . .; that no part of said sum of four hundred and sixty dollars has been paid and there is still due, owing and coming to said plaintiff from said defendants the sum of four hundred and sixty dollars."

We entertain no doubt that the cause of action thus stated constitutes the legal basis for the issuance of a writ of attachment as provided by our statute. The said complaint, in connection with the affidavit thereafter filed, clearly discloses that the action was upon an express contract "for the direct payment of money" and that the said contract was made in this state and was not "secured by any mortgage or lien upon real or personal property, or any pledge of personal property." The situation is therefore entirely within the contemplation of subdivision 1 of section 537 of the Code of Civil Procedure. But the provision of the statute applicable to this case is even more circumscribed. It is found in subdivision 2 of said section, as follows: "The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, . . . 2. In an action upon a contract, express or implied, against a defendant not residing in this state." As we have seen, the defendants, at the time of the beginning of the action, were residents of the state of New York and it is positively averred that they entered into a written contract to pay plaintiff a certain commission for sales of merchandise and that so much money was due and owing to plaintiff under said contract. It is not necessary that the contract itself should specify the total amount of money to be paid. That,

of course, in this case depended upon the number and extent of the sales that should be made by plaintiff. The requirement of the statute is satisfied when the contract furnishes the measure of liability or the information from which the amount due can be ascertained. This is not at all the case of unliquidated damages for which an attachment cannot be had. The distinction is clear and it is pointed out in several decisions of the supreme court. In *De Leonis v. Etchepare*, 120 Cal. 410, [52 Pac. 718] it is said: "Nor is it necessary, in order to give a right of attachment, that the amount in which the defendant may be liable should appear upon the face of the contract or instrument by or from which the liability is to be determined. It often happens that the amount due under a contract does not appear from the contract itself. 'Our code does not require that the amount due on the contract shall appear from the contract itself (Code Civ. Proc., sec. 537), but that the amount of the indebtedness shall be shown by affidavit. (Code Civ. Proc., sec. 538.) Attachment may issue in an action for damages for the breach of a contract. (*Donnelly v. Strueven*, 63 Cal. 182.) And this, where proof is necessary at the trial to show the amount of damages. (Drake on Attachment, secs. 13, 23.) But there must exist a basis upon which the damages can be determined by proof.' (*Dunn v. Mackey*, 80 Cal. 107, [22 Pac. 64].) Where the contract does not furnish the measure of the liability of the defendant, and the damages are unliquidated, an attachment cannot be had, and the language quoted by appellant, from *Hathaway v. Davis*, 33 Cal. 161, means no more than that."

As to the cases from other states, cited by appellants, we may appropriately adopt the following comment from *Kohler v. Agassiz*, 99 Cal. 12, [33 Pac. 742]: "The attachment laws of the several states differ in so many particulars, that without the utmost caution in comparing their provisions with our own, we are in constant danger of being led astray, or unduly influenced by decisions apparently in point, but in reality resting upon a different basis. Even our own adjudicated cases, many of them growing out of questions applicable to resident debtors, have no proper application to the different *status* occupied by nonresidents."

There is no ground for any criticism of the sufficiency of respondent's amended affidavit which was formally executed

and contained the following averments: "That the above named defendants are and were on the 13th day of September, 1912, indebted to said plaintiff in the sum of \$460, over and above all legal set-offs and counterclaims, upon an express contract for the direct payment of money, to wit: for commissions due plaintiff from said defendants for selling and disposing of said defendants' goods; that such contract was made and executed in this state, and that the payment of the same was not and has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property; that the said defendants are and were, on the said 13th day of September, 1912, nonresidents of the state of California, to wit: residents of the state of New York; that the said sum for which the attachment was and is asked and sought herein was and is an actual *bona fide* existing debt, due and owing from the said defendants to the said plaintiff; that the said attachment was and is not sought, and the said action was and is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the said defendants, or any creditor or creditors of either of said defendants." How completely and punctiliously plaintiff thus complied with the demands of the statute is made apparent by a reading of section 538 of the Code of Civil Procedure. Indeed, he exceeded the requirement of subdivision 2 of said section which is applicable to the present case. His redundant averments, however, did not vitiate nor impair the affidavit nor interfere with its operation as a legal step in the statutory process of obtaining a writ of attachment.

There is some question, however, as to whether the amended affidavit was filed in time. The record shows that, on the fifteenth day of November, 1912, the court submitted the motion to dissolve the attachment and that the amended affidavit was not filed until December 20th following. It was filed, though, before the court passed upon said motion. It is stated by respondent that "Said matter was not finally submitted on said 15th day of November, 1912, for both attorneys for appellants and respondent filed points and authorities thereafter," but the recital of the transcript must be accepted as conclusive. Section 558 of the Code of Civil Procedure provides that upon application to dissolve a writ of attachment if it satisfactorily appears that it "was improperly or irregularly issued it must be discharged; pro-

vided, that such attachment shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter." We think there is a substantial compliance with the requirement of this provision where the amended affidavit is filed before the actual determination of the motion to dissolve the attachment. Although not shown by the record, it may be, as stated by respondent, that "on the first day of November, 1912, when the motion to dissolve attachment came on regularly for hearing the respondent through his attorney moved the court for permission to amend the writ of attachment or the affidavit or undertaking upon which such attachment was based to conform to all the requirements of chapter IV, title VII, part II of the Code of Civil Procedure of this state, the court at that time informed the attorneys for appellants and respondent that if it was found that the action was one in which an attachment could properly issue and that amendments to any of the requirements were necessary that such permission would be granted."

We may assume that the proceeding was, as thus indicated, and we think that the court had authority to allow the amended affidavit to be filed after the application was made but prior to the adjudication of the motion to discharge the attachment.

Appellants also question the sufficiency of the undertaking and direct their attack particularly at the expression of the obligation of the surety in the following language: "does hereby undertake and promise to the effect that if the said defendants or either of them recover judgment, in said action, the said plaintiff will pay all costs that may be awarded to the said defendants and all damages which they may sustain by reason of the said attachment not exceeding the sum of two hundred dollars. And that if said attachment is discharged on the ground that plaintiff was not entitled thereto, under section 537 of the Code of Civil Procedure, the plaintiff will pay all damages which defendant may sustain by reason of the said attachment not exceeding the sum of two hundred dollars." The point is that the obligation should have been assumed and declared in favor of each of the defendants but by said undertaking liability was im-

posed upon the surety only for damages that might be suffered by all the defendants collectively. It is claimed that the same rule in this respect applies to the undertaking as to the affidavit and reference is had to *Pajaro Valley Bank v. Scurich*, 7 Cal. App. 732, [95 Pac. 911], wherein it was held that "where the writ of attachment was against the maker and indorsers of a promissory note, an affidavit for the writ merely stating 'that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor or creditors of the defendants' without adding the words, 'or any creditor of either of said defendants' is fatally defective; and a motion to discharge the writ on that ground should have been granted." (See, however, *Nichols v. Davis*, 23 Cal. App. 67, [137 Pac. 41].)

But passing that point, while the complaint here is somewhat loosely drawn, we think it sufficiently appears that the action was really against only one defendant, that is, L. Jacobson's Sons, the plaintiff being uncertain whether defendant constituted a partnership or a corporation, and it may be stated that there was no prayer for an individual judgment against the members of the association.

Besides, the record does not show that any attack was made upon the amended undertaking, the notice of motion to dissolve having been addressed to the original bond. Indeed, it is declared by respondent, in his brief, that the attorney for appellants stated in open court that he did not rely upon any objection to the undertaking and that he so stated to the judge of the lower court and to the attorney for respondent upon the settlement of the bill of exceptions, the attorney for the respondent requesting that a statement to that effect be inserted in said bill. It was not so inserted, but it may be said that it does not affirmatively appear that at the hearing of said motion any objection was made to said undertaking, and appellants have not denied nor questioned the accuracy of said statement in respondent's brief.

No sufficient reason has been presented for interfering with the action of the lower court and the order is therefore affirmed.

Chipman, P. J., and Hart, J., concurred.

The facts are similar to those stated in the opinion in *Anderson v. Nawa*, *ante*, p. 151.

F. A. Cutler, A. A. De Ligne, and H. W. Johnson, Jr., for Appellant.

J. J. Lerman, C. L. Tilden, and W. F. Postal, for Respondents.

THE COURT.—The parties to the above entitled cause having stipulated that the appeals from the two judgments rendered in the said action in favor of the respondent J. J. Lermen present questions identical to those presented in the appeals in the case, No. 1359, *Anderson v. Nawa et al.*, (opinion filed July 17, 1914), *ante*, p. 151, [143 Pac. 555], and the said parties having further stipulated that the facts in both cases upon which the judgments of dismissal are respectively based are in all respects substantially the same, and having further stipulated that all briefs and arguments filed or made on the appeal from the judgment in favor of respondent Swayne & Hoyt, a corporation (being case No. 1359, *supra*), may be considered as made and filed in the appeals from the judgments in favor of said respondent J. J. Lermen.

Now, therefore, it is hereby ordered upon the authority of the said case (No. 1359), and for the same reasons stated in the opinion filed therein, the first judgment, to wit, the judgment entered and recorded December 12, 1912, in favor of said respondent J. J. Lermen, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

[Civ. No. 1359. First Appellate District.—July 21, 1914.]

ALDEN ANDERSON, Superintendent of Banks of the State of California, Appellant, v. **Y. NAWA et al.**, Respondents.

BANKS—ENFORCEMENT OF LIABILITY OF STOCKHOLDERS—ACTION BY BANK COMMISSIONER—DISMISSAL FOR DELAY IN SERVICE OF SUMMONS.—The judgment entered in favor of the respondent T. Shibata, on January 14, 1913, is affirmed, and the appeal from the judgment entered on February 14, 1913, is dismissed, on the authority of *Anderson v. Nawa*, *ante*, p. 151.

APPEALS from judgments of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are similar to those stated in the opinion in *Anderson v. Nawa*, *ante*, p. 151.

F. A. Cutler, A. A. De Ligne, and H. W. Johnson, Jr., for Appellant.

J. J. Lerman, C. L. Tilden, and W. F. Postel, for Respondents.

THE COURT.—The parties to the above entitled cause having stipulated that the appeals from the two judgments rendered in the said action in favor of the respondent T. Shibata present questions identical to those presented in the appeals in the case, No. 1359, *Anderson v. Nawa et al.*, (opinion filed July 17, 1914), *ante*, p. 151, [143 Pac. 555], and the said parties having further stipulated that the facts in both cases upon which the judgments of dismissal are respectively based are in all respects substantially the same, and having further stipulated that the transcript and briefs and arguments filed or made on the appeal from the judgment in favor of respondent Swayne & Hoyt, a corporation (being case No. 1359, *supra*), may be considered as made and filed in the appeals from the judgments in favor of said respondent T. Shibata,

Now, therefore, it is hereby ordered upon the authority of the said case (No. 1359), and for the same reasons stated in

The facts are similar to those stated in *supra* wit, the *Anderson v. Nawa, ante*, p. 151. 1913, in favor

F. A. Cutler, A. A. De Ligne, and H. W. Johnson, Jr., for Appellant entered and

J. J. Lerman, C. L. Tilden, and W. F. Postel, for Respondents.

THE COURT.—The parties having stipulated that the appeals from the said action rendered in the said action in favor of the respondent C. L. Tilden present questions identical to those presented in the appeals in the case, No. 1359, *Anderson v. Nawa et al.*, (opinion filed July 17, 1914), *ante*, p. 151, [143 Pac. 555], and the said parties having further stipulated that the facts in both cases upon which the judgments of dismissal are respectively based are in all respects substantially the same, and having

LIABILITY OF STOCKHOLDERS—ACTION BY DISMISSAL FOR DELAY IN SERVICE OF SUMMONS—JUDGMENT ENTERED IN FAVOR OF THE RESPONDENT C. L. TILDEN—APPEALS FROM THE JUDGMENTS OF THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. George A. Sturtevant, for Appellant.

The facts are similar to those stated in the opinion in *Anderson v. Nawa, ante*, p. 151.

F. A. Cutler, A. A. De Ligne, and H. W. Johnson, Jr., for Appellant.

J. J. Lerman, C. L. Tilden, and W. F. Postel, for Respondents.

THE COURT.—The parties to the above entitled cause having stipulated that the appeals from the two judgments rendered in the said action in favor of the respondent C. L. Tilden present questions identical to those presented in the appeals in the case, No. 1359, *Anderson v. Nawa et al.*, (opinion filed July 17, 1914), *ante*, p. 151, [143 Pac. 555], and the said parties having further stipulated that the facts in both cases upon which the judgments of dismissal are respectively based are in all respects substantially the same, and having

Memorandum Case

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Civ. No. 1359

stipulated that the transcript and briefs and arguments made on the appeal from the judgment in favor of Swayne & Hoyt, a corporation (being case No. 1359) be considered as made and filed in the arguments in favor of said respondent C. L. Tilden.

Therefore, it is hereby ordered upon the authority of the court (No. 1359), and for the same reasons stated in the transcript filed therein, the first judgment, to wit, the judgment entered and recorded January 14, 1913, in favor of respondent C. L. Tilden, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

[Civ. No. 1369. First Appellate District.—July 25, 1914.]

L. G. PARKER, Appellant, v. W. S. KINGSBURY, as Surveyor-General and ex-officio Register of the State Land Office etc., Respondent.

STATE LANDS—APPLICATION TO PURCHASE—WITHDRAWAL FROM SALE.—Judgment affirmed on the authority of *Ayers v. Kingsbury*, ante, p. 183.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are similar to those stated in the opinion in *Ayers v. Kingsbury*, ante, p. 183.

Devlin, Devlin & Maddux, and Charles C. Boynton, for Appellant.

U. S. Webb, Attorney-General, Robert W. Harrison, Deputy Attorney-General, and Malcolm C. Glenn, Deputy Attorney-General, for Respondents.

LENNON, P. J.—This case in its essential features is identical with the case of *Ayers v. Kingsbury*, (Civ. No. 1368), ante, p. 183, [143 Pac. 85], this day decided. For the reasons

the opinion filed therein, the first judgment, to wit, the judgment entered and recorded January 14, 1913, in favor of said respondent T. Shibata, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

[Civ. No. 1359. First Appellate District.—July 21, 1914.]

ALDEN ANDERSON, Superintendent of Banks of the State of California, Appellant, v. **Y. NAWA et al.**, Respondents.

BANKS—ENFORCEMENT OF LIABILITY OF STOCKHOLDERS—ACTION BY BANK COMMISSIONER—DISMISSAL FOR DELAY IN SERVICE OF SUMMONS.—The judgment entered in favor of the respondent C. L. Tilden, on January 14, 1913, is affirmed, and the appeal from the judgment entered on February 14, 1913, is dismissed on the authority of *Anderson v. Nawa, ante*, p. 151.

APPEALS from judgments of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are similar to those stated in the opinion in *Anderson v. Nawa, ante*, p. 151.

F. A. Cutler, A. A. De Ligne, and H. W. Johnson, Jr., for Appellant.

J. J. Lerman, C. L. Tilden, and W. F. Postal, for Respondents.

THE COURT.—The parties to the above entitled cause having stipulated that the appeals from the two judgments rendered in the said action in favor of the respondent C. L. Tilden present questions identical to those presented in the appeals in the case, No. 1359, *Anderson v. Nawa et al.*, (opinion filed July 17, 1914), *ante*, p. 151, [143 Pac. 555], and the said parties having further stipulated that the facts in both cases upon which the judgments of dismissal are respectively based are in all respects substantially the same, and having

further stipulated that the transcript and briefs and arguments filed or made on the appeal from the judgment in favor of respondent Swayne & Hoyt, a corporation (being case No. 1359, *supra*), may be considered as made and filed in the appeals from the judgments in favor of said respondent C. L. Tilden,

Now, therefore, it is hereby ordered upon the authority of the said case (No. 1359), and for the same reasons stated in the opinion filed therein, the first judgment, to wit, the judgment entered and recorded January 14, 1913, in favor of said respondent C. L. Tilden, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

[Civ. No. 1369. First Appellate District.—July 25, 1914.]

L. G. PARKER, Appellant, v. W. S. KINGSBURY, as Surveyor-General and ex-officio Register of the State Land Office etc., Respondent.

STATE LANDS—APPLICATION TO PURCHASE—WITHDRAWAL FROM SALE.—
Judgment affirmed on the authority of *Ayers v. Kingsbury*, *ante*, p. 183.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are similar to those stated in the opinion in *Ayers v. Kingsbury*, *ante*, p. 183.

Devlin, Devlin & Maddux, and Charles C. Boynton, for Appellant.

U. S. Webb, Attorney-General, Robert W. Harrison, Deputy Attorney-General, and Malcolm C. Glenn, Deputy Attorney-General, for Respondents.

LENNON, P. J.—This case in its essential features is identical with the case of *Ayers v. Kingsbury*, (Civ. No. 1368), *ante*, p. 183, [143 Pac. 85], this day decided. For the reasons

the opinion filed therein, the first judgment, to wit, the judgment entered and recorded January 14, 1913, in favor of said respondent T. Shibata, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

[Civ. No. 1359. First Appellate District.—July 21, 1914.]

ALDEN ANDERSON, Superintendent of Banks of the State of California, Appellant, v. **Y. NAWA et al.**, Respondents.

BANKS—ENFORCEMENT OF LIABILITY OF STOCKHOLDERS—ACTION BY BANK COMMISSIONER—DISMISSAL FOR DELAY IN SERVICE OF SUMMONS.—The judgment entered in favor of the respondent C. L. Tilden, on January 14, 1913, is affirmed, and the appeal from the judgment entered on February 14, 1913, is dismissed on the authority of *Anderson v. Nawa, ante*, p. 151.

APPEALS from judgments of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are similar to those stated in the opinion in *Anderson v. Nawa, ante*, p. 151.

F. A. Cutler, A. A. De Ligne, and H. W. Johnson, Jr., for Appellant.

J. J. Lerman, C. L. Tilden, and W. F. Postal, for Respondents.

THE COURT.—The parties to the above entitled cause having stipulated that the appeals from the two judgments rendered in the said action in favor of the respondent C. L. Tilden present questions identical to those presented in the appeals in the case, No. 1359, *Anderson v. Nawa et al.*, (opinion filed July 17, 1914), *ante*, p. 151, [143 Pac. 555], and the said parties having further stipulated that the facts in both cases upon which the judgments of dismissal are respectively based are in all respects substantially the same, and having

further stipulated that the transcript and briefs and arguments filed or made on the appeal from the judgment in favor of respondent Swayne & Hoyt, a corporation (being case No. 1359, *supra*), may be considered as made and filed in the appeals from the judgments in favor of said respondent C. L. Tilden,

Now, therefore, it is hereby ordered upon the authority of the said case (No. 1359), and for the same reasons stated in the opinion filed therein, the first judgment, to wit, the judgment entered and recorded January 14, 1913, in favor of said respondent C. L. Tilden, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

[Civ. No. 1369. First Appellate District.—July 25, 1914.]

L. G. PARKER, Appellant, v. W. S. KINGSBURY, as Surveyor-General and ex-officio Register of the State Land Office etc., Respondent.

STATE LANDS—APPLICATION TO PURCHASE—WITHDRAWAL FROM SALE.—
Judgment affirmed on the authority of *Ayers v. Kingsbury*, *ante*, p. 183.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are similar to those stated in the opinion in *Ayers v. Kingsbury*, *ante*, p. 183.

Devlin, Devlin & Maddux, and Charles C. Boynton, for Appellant.

U. S. Webb, Attorney-General, Robert W. Harrison, Deputy Attorney-General, and Malcolm C. Glenn, Deputy Attorney-General, for Respondents.

LENNON, P. J.—This case in its essential features is identical with the case of *Ayers v. Kingsbury*, (Civ. No. 1368), *ante*, p. 183, [143 Pac. 85], this day decided. For the reasons

the opinion filed therein, the first judgment, to wit, the judgment entered and recorded January 14, 1913, in favor of said respondent T. Shibata, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

[Civ. No. 1359. First Appellate District.—July 21, 1914.]

ALDEN ANDERSON, Superintendent of Banks of the State of California, Appellant, v. **Y. NAWA et al.**, Respondents.

BANKS—ENFORCEMENT OF LIABILITY OF STOCKHOLDERS—ACTION BY BANK COMMISSIONER—DISMISSAL FOR DELAY IN SERVICE OF SUMMONS.—The judgment entered in favor of the respondent C. L. Tilden, on January 14, 1913, is affirmed, and the appeal from the judgment entered on February 14, 1913, is dismissed on the authority of *Anderson v. Nawa*, ante, p. 151.

APPEALS from judgments of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are similar to those stated in the opinion in *Anderson v. Nawa*, ante, p. 151.

F. A. Cutler, A. A. De Ligne, and H. W. Johnson, Jr., for Appellant.

J. J. Lerman, C. L. Tilden, and W. F. Postel, for Respondents.

THE COURT.—The parties to the above entitled cause having stipulated that the appeals from the two judgments rendered in the said action in favor of the respondent C. L. Tilden present questions identical to those presented in the appeals in the case, No. 1359, *Anderson v. Nawa et al.*, (opinion filed July 17, 1914), ante, p. 151, [143 Pac. 555], and the said parties having further stipulated that the facts in both cases upon which the judgments of dismissal are respectively based are in all respects substantially the same, and having

further stipulated that the transcript and briefs and arguments filed or made on the appeal from the judgment in favor of respondent Swayne & Hoyt, a corporation (being case No. 1359, *supra*), may be considered as made and filed in the appeals from the judgments in favor of said respondent C. L. Tilden,

Now, therefore, it is hereby ordered upon the authority of the said case (No. 1359), and for the same reasons stated in the opinion filed therein, the first judgment, to wit, the judgment entered and recorded January 14, 1913, in favor of said respondent C. L. Tilden, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

[Civ. No. 1369. First Appellate District.—July 25, 1914.]

L. G. PARKER, Appellant, v. W. S. KINGSBURY, as Surveyor-General and ex-officio Register of the State Land Office etc., Respondent.

STATE LANDS—APPLICATION TO PURCHASE—WITHDRAWAL FROM SALE.—

Judgment affirmed on the authority of *Ayers v. Kingsbury*, *ante*, p. 183.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are similar to those stated in the opinion in *Ayers v. Kingsbury*, *ante*, p. 183.

Devlin, Devlin & Maddux, and Charles C. Boynton, for Appellant.

U. S. Webb, Attorney-General, Robert W. Harrison, Deputy Attorney-General, and Malcolm C. Glenn, Deputy Attorney-General, for Respondents.

LENNON, P. J.—This case in its essential features is identical with the case of *Ayers v. Kingsbury*, (Civ. No. 1368), *ante*, p. 183, [143 Pac. 85], this day decided. For the reasons

the opinion filed therein, the first judgment, to wit, the judgment entered and recorded January 14, 1913, in favor of said respondent T. Shibata, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

[Civ. No. 1359. First Appellate District.—July 21, 1914.]

ALDEN ANDERSON, Superintendent of Banks of the State of California, Appellant, v. **Y. NAWA et al.**, Respondents.

BANKS—ENFORCEMENT OF LIABILITY OF STOCKHOLDERS—ACTION BY BANK COMMISSIONER—DISMISSAL FOR DELAY IN SERVICE OF SUMMONS.—The judgment entered in favor of the respondent C. L. Tilden, on January 14, 1913, is affirmed, and the appeal from the judgment entered on February 14, 1913, is dismissed on the authority of *Anderson v. Nawa*, ante, p. 151.

APPEALS from judgments of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are similar to those stated in the opinion in *Anderson v. Nawa*, ante, p. 151.

F. A. Cutler, A. A. De Ligne, and H. W. Johnson, Jr., for Appellant.

J. J. Lerman, C. L. Tilden, and W. F. Postel, for Respondents.

THE COURT.—The parties to the above entitled cause having stipulated that the appeals from the two judgments rendered in the said action in favor of the respondent C. L. Tilden present questions identical to those presented in the appeals in the case, No. 1359, *Anderson v. Nawa et al.*, (opinion filed July 17, 1914), ante, p. 151, [143 Pac. 555], and the said parties having further stipulated that the facts in both cases upon which the judgments of dismissal are respectively based are in all respects substantially the same, and having

further stipulated that the transcript and briefs and arguments filed or made on the appeal from the judgment in favor of respondent Swayne & Hoyt, a corporation (being case No. 1359, *supra*), may be considered as made and filed in the appeals from the judgments in favor of said respondent C. L. Tilden,

Now, therefore, it is hereby ordered upon the authority of the said case (No. 1359), and for the same reasons stated in the opinion filed therein, the first judgment, to wit, the judgment entered and recorded January 14, 1913, in favor of said respondent C. L. Tilden, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

[Civ. No. 1369. First Appellate District.—July 25, 1914.]

L. G. PARKER, Appellant, v. W. S. KINGSBURY, as Surveyor-General and ex-officio Register of the State Land Office etc., Respondent.

STATE LANDS—APPLICATION TO PURCHASE—WITHDRAWAL FROM SALE.—
Judgment affirmed on the authority of *Ayers v. Kingsbury*, *ante*, p. 183.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are similar to those stated in the opinion in *Ayers v. Kingsbury*, *ante*, p. 183.

Devlin, Devlin & Maddux, and Charles C. Boynton, for Appellant.

U. S. Webb, Attorney-General, Robert W. Harrison, Deputy Attorney-General, and Malcolm C. Glenn, Deputy Attorney-General, for Respondents.

LENNON, P. J.—This case in its essential features is identical with the case of *Ayers v. Kingsbury*, (Civ. No. 1368), *ante*, p. 183, [143 Pac. 85], this day decided. For the reasons

the opinion filed therein, the first judgment, to wit, the judgment entered and recorded January 14, 1913, in favor of said respondent T. Shibata, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

[Civ. No. 1359. First Appellate District.—July 21, 1914.]

ALDEN ANDERSON, Superintendent of Banks of the State of California, Appellant, v. **Y. NAWA et al.**, Respondents.

BANKS—ENFORCEMENT OF LIABILITY OF STOCKHOLDERS—ACTION BY BANK COMMISSIONER—DISMISSAL FOR DELAY IN SERVICE OF SUMMONS.—The judgment entered in favor of the respondent C. L. Tilden, on January 14, 1913, is affirmed, and the appeal from the judgment entered on February 14, 1913, is dismissed on the authority of *Anderson v. Nawa*, ante, p. 151.

APPEALS from judgments of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are similar to those stated in the opinion in *Anderson v. Nawa*, ante, p. 151.

F. A. Cutler, A. A. De Ligna, and H. W. Johnson, Jr., for Appellant.

J. J. Lerman, C. L. Tilden, and W. F. Postel, for Respondents.

THE COURT.—The parties to the above entitled cause having stipulated that the appeals from the two judgments rendered in the said action in favor of the respondent C. L. Tilden present questions identical to those presented in the appeals in the case, No. 1359, *Anderson v. Nawa et al.*, (opinion filed July 17, 1914), ante, p. 151, [143 Pac. 555], and the said parties having further stipulated that the facts in both cases upon which the judgments of dismissal are respectively based are in all respects substantially the same, and having

further stipulated that the transcript and briefs and arguments filed or made on the appeal from the judgment in favor of respondent Swayne & Hoyt, a corporation (being case No. 1359, *supra*), may be considered as made and filed in the appeals from the judgments in favor of said respondent C. L. Tilden,

Now, therefore, it is hereby ordered upon the authority of the said case (No. 1359), and for the same reasons stated in the opinion filed therein, the first judgment, to wit, the judgment entered and recorded January 14, 1913, in favor of said respondent C. L. Tilden, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

[Civ. No. 1369. First Appellate District.—July 25, 1914.]

L. G. PARKER, Appellant, v. W. S. KINGSBURY, as Surveyor-General and ex-officio Register of the State Land Office etc., Respondent.

STATE LANDS—APPLICATION TO PURCHASE—WITHDRAWAL FROM SALE.—
Judgment affirmed on the authority of *Ayers v. Kingsbury*, *ante*, p. 183.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are similar to those stated in the opinion in *Ayers v. Kingsbury*, *ante*, p. 183.

Devlin, Devlin & Maddux, and Charles C. Boynton, for Appellant.

U. S. Webb, Attorney-General, Robert W. Harrison, Deputy Attorney-General, and Malcolm C. Glenn, Deputy Attorney-General, for Respondents.

LENNON, P. J.—This case in its essential features is identical with the case of *Ayers v. Kingsbury*, (Civ. No. 1368), *ante*, p. 183, [143 Pac. 85], this day decided. For the reasons

stated in the opinion of this court filed in that case, the judgment appealed from herein is affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 23, 1914.

[Civ. No. 1372. First Appellate District.—July 28, 1914]

ROBERT BRAGG, Executor of the Last Will of Mary Jane Bragg, Deceased, Respondent, v. ELIZABETH BRAGG CUMMING, Appellant.

GIFT TO BE CONSUMMATED IN CASE OF DEATH—INTENTION.—Judgment and order refusing a new trial reversed on the authority of *Bragg v. Martenstein*, ante, p. 199.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. John Hunt, Judge.

The facts are similar to those stated in the opinion in *Bragg v. Martenstein*, ante, p. 199.

T. A. Perkins, and R. V. Whiting, for Appellant.

Gerald C. Halsey, for Respondent.

KERRIGAN, J.—The facts in this case as presented at the trial were identical with those produced and considered by the trial court and reviewed by this court in the case of *Bragg v. Martenstein*, (Civ. No. 1487), ante, p. 199, [143 Pac. 79]. The reasoning and conclusions of this court in that case are in all respects applicable to the case at bar. It follows that the judgment and order herein must be reversed and the cause remanded for a new trial, and it is so ordered.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 26, 1914.

[Crim. No. 254. Third Appellate District.—September 10, 1914.]

THE PEOPLE, Respondent, v. H. D. SUHR, Appellant.

CRIMINAL LAW—HOMICIDE—Judgment and order denying a new trial affirmed on the authority of *People v. Ford*, ante, p. 388.

APPEAL from a judgment of the Superior Court of Yuba County and from an order refusing a new trial. Eugene P. McDaniel, Judge.

The facts are similar to those stated in the opinion in *People v. Ford*, ante, p. 388.

R. W. Boyce, and Austin Lewis, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

THE COURT.—It was stipulated that Crim. No. 253, *People v. Ford*, and Crim. No. 254, *People v. Suhr*, should be tried together and that the appeals in both cases should be heard on the record brought up in Crim. No. 253, *People v. Ford*. The law and the facts in both cases have been fully considered in *People v. Ford*, ante, p. 388, [143 Pac. 1075], this day decided.

Upon the authority of that case and for the reasons therein given,

The judgment and order are affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 9, 1914.

[Civ. No. 1457. First Appellate District.—September 22, 1914.]

M. P. SCOTT, Petitioner and Respondent, v. THOMAS F. BOYLE, as Auditor of the City and County of San Francisco, State of California, Appellant.

PUBLIC OFFICER—VACANCY IN OFFICE—PREVENTION OF PERFORMANCE OF DUTIES BY INJUNCTION.—Judgment affirmed on the authority of *McEvers v. Boyle*, ante, p. 476.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. J. M. Seawell, Judge.

The facts are similar to those stated in the opinion in *McEvers v. Boyle*, ante, p. 476.

Percy V. Long, City Attorney, and Harry G. McKannay, Assistant City Attorney, for Appellant.

Pemberton & Pemberton, for Respondent.

THE COURT.—The parties in the above-entitled cause having stipulated that the appeals from the judgment and order rendered in said cause in favor of the respondent, M. P. Scott, presents questions identical with those presented in the case of No. 1431, *McEvers v. Boyle*, ante, p. 476, [144 Pac. 308], decided by this court on September 21, 1914; that the facts in both cases are in all respects the same; and that all briefs and arguments filed and made on the appeal from the judgment in favor of the petitioner and respondent, J. W. McEvers (being case No. 1431), may be considered as made and filed in the appeal from the judgment and order in favor of said respondent M. P. Scott,

Now, therefore, it is hereby ordered upon the authority of the case of *McEvers v. Boyle* (Civ. No. 1431), and for the reasons stated in the opinion filed therein, that the order and judgment appealed from in the above-entitled cause be, and the same are hereby affirmed.

[Civ No. 1211. Third Appellate District.—October 27, 1914.]

COLUSA AND HAMILTON RAILROAD COMPANY, Respondent, v. CHARLES H. GLENN et al., Appellants.

CONDEMNATION OF LAND—RIGHT OF WAY.—Judgment vacated as the effect of the affirmance of the order granting a new trial in *Colusa and Hamilton Railroad Company v. Glenn, ante*, p. 634.

APPEAL from a judgment of the Superior Court of Glenn County. William M. Finch, Judge.

The facts are stated in the opinion in *Colusa and Hamilton Railroad Company v. Glenn, ante*, p. 634.

Ben J. Geis, and Duard F. Geis, for Appellants.

Frank Freeman, for Respondent.

THE COURT.—This is an appeal from the judgment taken by plaintiff. As we have this day affirmed the order granting the motion for a new trial (Civ. No. 1210), *ante*, p. 634, [144 Pac. 993], and the effect of that order was to vacate the judgment, it is unnecessary to make any formal disposition of this appeal.

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ABANDONMENT. See Quieting Title, 10, 11.

ACCOUNTING. See Partnership, 2-3.

ACCOUNT STATED.

1. **DEFINITION OF ACCOUNT STATED—CONCLUSIVENESS UPON PARTIES—OPENING AND RE-EXAMINATION.**—An account stated is an agreed balance of accounts; an account which has been examined and accepted by the parties. It does not, however, operate as an estoppel, and it may be impeached for fraud or mistake. If there has been any mistake, omission, accident, fraud, or undue advantage, by which the account is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined. (Union Lumber Co. v. J. W. Schouten & Co., 80.)
2. **ABSENCE OF FRAUD—FAIRNESS OF TRANSACTION—FINDINGS SUPPORTED BY EVIDENCE.**—In this action upon an account stated it is held, on an appeal from the judgment, that the findings of the court as to the absence of fraud and the fairness of the transaction culminating in the statement of account, are abundantly supported. (Adams v. Gerig, 638.)
3. **EVIDENCE OF OMISSIONS AND ERRORS ADMISSIBLE.**—In an action upon an account stated it is proper for the court to allow evidence of omissions and errors therein. In such a case the whole account need not be opened and readjusted, but the mistake can be corrected and the rights of the parties readjusted as to such mistake, and the parties are bound by the balance of the account. (Id.)

See Pleading, 1-4.

ADOPTION. See Parent and Child, 5.

ADVERSE POSSESSION.

ADVERSE POSSESSION OF LAND.—Judgments and orders refusing a new trial in each of the above entitled cases are affirmed, in pursuance of stipulation, in accordance with the decision in *Lummer v. Unruh*, ante, p. 97. (Unruh v. Lummer; Perry v. Lummer; Rogers v. Lummer, 798.)

AFFIDAVIT OF MERITS. See Judgment, 3; Place of Trial.

AGENCY.

1. **CONTRACTS—SALE OF AUTOMOBILES—EXCLUSIVE RIGHT OF SALE IN CERTAIN COUNTY—WHEN AGENT NOT ENTITLED TO COMMISSIONS.**—Where a contract appointing an agent as exclusive selling representative of automobiles in a particular county provides for an allowance of a certain discount to the agent from the list price of the machines sold by him in his territory, and it is further provided that in the event of the principal making a sale in the territory, the agent is to receive a certain reduced commission on the sale, provided the sale is made at "regular retail prices established by the factory," but if made at a less price the commission payable to the agent shall be agreed upon specially each time in advance, the agent is not entitled to a commission on a sale made three months after the termination of his contract, where there is no intimation that the contract of purchase was entered into after the expiration of the agency with the view of affecting the question of commissions; nor is he entitled to a commission on a sale made by the principal outside his territory to a resident of the territory at a price less than the regular retail price established by the factory, where the commission was not agreed upon in advance as provided by the contract; especially where the evidence is ample to sustain the view that the agent was not the moving cause of the sale; nor does a sale made by the principal out of the county to a resident in the county come within the terms of the contract where it is not shown that the principal, in order to effect the sale, entered the territory of the agent. (*Parry v. American Motors California Company*, 706.)
2. **SALE MADE OUT OF AGENT'S TERRITORY TO RESIDENT THEREOF—AGENT NOT ENTITLED TO COMMISSION.**—In the absence of any trade usage to the contrary, an agent to whom a manufacturing concern has given the exclusive sale of its products within a given territory is not entitled to commission on a sale made by the manufacturer outside of such territory to a resident thereof. (*Id.*)
3. **ACTUAL AUTHORITY—DEFINITION OF.**—Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess. (*Herington v. Alta Planing Mill Company*, 620.)
4. **BREACH OF CONTRACT—ACTION FOR DAMAGES—OSTENSIBLE AUTHORITY—PARTY MUST HAVE RELIED UPON.**—In order that a person dealing with an agent may recover damages for a breach of contract, resting solely upon authority of an ostensible nature, it must have happened that such person, by reason of his reliance upon the ostensible authority, incurred a liability or parted with value. (*Id.*)
5. **AUTHORITY CONFERRED BY WANT OF CARE.**—Actual authority, which is conferred through the negligence, or want of ordinary care, on the part of the principal, is only such as the principal allows the agent to believe himself to possess. Whatever strangers may

AGENCY (Continued).

understand to be the limit of actual authority is an immaterial matter, for the implied authority of an agent, upon which third persons are authorized to rely, is the ostensible authority, or that authority, arising by want of ordinary care of the principal, which causes or allows a third person to believe the agent to possess. (Id.)

6. **PROPOSAL FOR BUILDING SUPPLIES—LACK OF AUTHORITY.**—A solicitor of a corporation, engaged in the business of furnishing building accessories, has no authority, either actual or ostensible, to alter a typewritten estimate of the cost, for which the corporation would furnish certain building materials, where it is shown, upon the face of the offer, that it was prepared in the office of the corporation, and that it bore the signature of a person specially employed as an estimator or calculator, other than the solicitor, and that the person upon whose request the offer was furnished did not act upon it until after it was altered. (Id.)
7. **CONTRACTS—AGREEMENT TO PAY NOTE OF THIRD PARTY—EXECUTION BY AGENT—PLEADING AND FINDINGS—WHEN NO VARIANCE BETWEEN.**—Where a written agreement is executed by an agent in his own name for his undisclosed principal, in which he promises, in consideration of the transfer to him of certain corporation stock, to pay certain claims of third parties, among them the promissory note in suit, in an action on the agreement there is no variance between an allegation of the complaint that both the agent and the principal expressly agreed in writing, for a valuable consideration moving to each of them, to pay said promissory note, and a finding that the principal alone made such promise, it appearing from the evidence, and the court finding, that the agent was in fact acting for his undisclosed principal. (*Montgomery v. Dorn*, 666.)
8. **PLEADING—PARTIES—PRINCIPAL AND AGENT—JOINDER.**—The general rule is that, where a contract is made by an agent within the scope of his employment, both the agent and the undisclosed principal, when discovered, are liable on the contract and may be joined as defendants. (Id.)
9. **PLEADING—AGENCY NEED NOT BE ALLEGED.**—It is not necessary in such a case to aver the fact of agency, it being sufficient to charge the act as that of the principal, without disclosing the fact of the agency; and where the proof is that such acts were done or knowledge obtained by the principal's authorized agent there is no variance. (Id.)
10. **EVIDENCE—ADMISSIBILITY OF NOTE AND CONTRACT.**—In such a case evidence offered by the plaintiff as to the execution and delivery of the note, as to the pledging of shares of corporation stock, and as to the contract for the sale of certain of said shares, is admissible, although the appellant's name did not appear on the note or in the contract, where the testimony later connected the appellant with the transaction. (Id.)

AGENCY (Continued).

11. **EVIDENCE—RECEIPT OF BENEFITS—ADMISSIBILITY OF TESTIMONY OF AGENT.**—In such a case it was competent to show who received the benefits of the transaction, and also to show by the agent for whom he was acting. (Id.)
12. **EVIDENCE—AGENT COMPETENT TO TESTIFY TO AGENCY.**—While the statements or admissions of one not as a witness, that in a certain transaction he acted as agent for another, are not competent to prove the fact of agency, yet if he is called as a witness, his testimony not only that he acted as agent of the party, but as to the fact of agency, where it rests in parol, is as competent as that of any other witness. (Id.)
13. **CONNECTION OF APPELLANT WITH TRANSACTION—LIABILITY OF APPELLANT.**—In such a case the contention that the liability rested upon a certain company, instead of upon appellant, cannot be sustained, where the agent testified that to the best of his knowledge, appellant was a member of said company and that he represented the company in the negotiations, that appellant was the only person disclosed as principal, that he received the benefits and profits of the contract and that the agent was acting for appellant throughout the transaction and that the latter became the owner of the stock "in pursuance of the contract," and where it further appeared that appellant was a witness in his own behalf and neither in his answer, nor in his testimony claimed that said company was a party to the transaction, and the testimony of two other witnesses showed that the transaction was for appellant's individual benefit. (Id.)
14. **VALIDITY OF CONTRACT.**—In such a case, inasmuch as the agreement was one not required to be in writing, it was not essential that the agent's authority to act should be in writing, and section 2309 of the Civil Code has no application. (Id.)
15. **AUTHORITY OF AGENT.**—In such a case the claim that the agent's authority being "expressed in general terms" he had no authority "to act in his own name," under section 2322 of the Civil Code, cannot be maintained, where the evidence shows that the principal did not desire to buy the stock in his own name and requested the agent to execute the contract in the latter's name. (Id.)
16. **PROMISSORY NOTE—NONPAYMENT—EVIDENCE.**—The production of a promissory note showing no indorsement of payment is *prima facie* evidence of nonpayment. (Id.)
17. **CONTRACT TO PAY CLAIMS OF THIRD PARTY—RIGHT OF THIRD PARTY TO ENFORCE.**—In such a case where the appellant agreed, in consideration of the transfer of certain corporation stock to him, to pay certain claims of third parties, among them the promissory note in suit, his promise is one made for the benefit of said third parties, which may be enforced by the latter. (Id.)

See Brokers; Insurance, 10, 12.

ALIENS. See Orphan Asylum.

AMENDMENT. See Pleading.

APPEAL.

1. **INTERVENTION—ORDER DISALLOWING—BILL OF EXCEPTIONS—AUTHENTICATION OF RECORD.**—While an order disallowing an intervention amounts in legal effect to a final judgment as to the proposed intervener, yet where an appeal is taken from such order, the record thereon must be authenticated by a bill of exceptions containing all the papers and documents used in that particular proceeding and upon which the trial court acted in making the order. (*Britt v. East Side Hardware Company*, 231.)
2. **JUDGMENT-ROLL—CERTIFICATION OF RECORD.**—It can hardly be said that there is, within the contemplation of section 670 of the Code of Civil Procedure, a judgment-roll in a proceeding on a motion for leave to intervene in an action, where the motion has been denied, and hence the certificate of the clerk of the trial court that "the foregoing is a true copy of the transcript of the judgment-roll in the above entitled cause," is not an authentication of the record on the motion. (*Id.*)
3. **AUTHENTICATION OF RECORD—METHOD PRESCRIBED BY RULES OF SUPREME COURT.**—The only proper method for authenticating a record on an appealable order is by a bill of exceptions, as required by rule XXIX of the supreme court. (*Id.*)
4. **ABSENCE OF PLEADINGS OF ORIGINAL PARTIES FROM RECORD—PRESUMPTION.**—Where the record on appeal from an order disallowing the application of a stockholder to intervene in an action brought against his corporation does not show the pleadings of the original parties, the appellate court will assume that no legal ground or reason was presented for the intervention sought. (*Id.*)
5. **POSITION OF APPELLATE COURT—AFFIRMANCE OF ORDER.**—In the absence from the bill of exceptions of the pleadings of the original parties, it is impossible for the appellate court to determine whether the proposed intervention appertains to the same transaction or the alleged cause of action upon which the action is founded, or whether the appellant is interested in the subject matter of the litigation and entitled to intervene, or whether he has presented any different or further facts than those set up in the defendant's answer, and the order will be affirmed. (*Id.*)
6. **REHEARING OR TRANSFER OF CASE—POINTS THEN RAISED FOR FIRST TIME.**—Points raised for the first time in a petition for rehearing or for a transfer to the supreme court will not be considered by the court of appeals. (*Cain v. French*, 499.)
7. **WHAT POINTS MAY BE REGARDED AS HAVING BEEN DECIDED BY APPELLATE COURT.**—No point in a case can be said to have been de-

APPEAL (Continued).

cided on appeal, except the one specifically dealt with and such others as may be said to be necessarily determined by the decision of the point under discussion. (*Parkin v. Grayson-Owen Co.*, 269.)

8. **WEIGHT AND CREDIBILITY OF EVIDENCE—CONCLUSIVENESS OF CONCLUSION OF TRIAL COURT.**—Where the evidence is substantially conflicting, it is not the province of this court to weigh the same, or determine whether or not witnesses have sworn falsely. If there is any evidence upon which the court could have made the findings, or a jury could have found a verdict, the action of the trial court must be upheld. (*Lummer v. Unruh*, 97.)
9. **ORDER DENYING MOTION TO RECALL EXECUTION—INSUFFICIENCY OF RECORD—DISMISSAL.**—An appeal from an order denying a motion to recall and quash an execution, and from an order denying an application for an injunction restraining the sheriff from further proceedings under the execution, will be dismissed, if in lieu of a bill of exceptions settled by the court and exhibiting the alleged errors of the court in the proceedings, the appellant has incorporated in a typewritten copy thereof certain affidavits, telegrams, and letters, certified by the clerk to be true copies of such original documents on file in his office, and it does not appear that these documents were presented to the court or considered upon the hearing of the motions, or, assuming they were so offered and received, that other evidence was not offered and considered. (*Columbia Crude Oil Company v. Deyo*, 268.)
10. **ABSENCE OF BILL OF EXCEPTIONS—AUTHENTICATION OF TRANSCRIPT.** When a bill of exceptions is not adopted as a means for presenting the record on an appeal from such orders, the party appealing must, in having the record authenticated, comply with the provisions of section 953a of the Code of Civil Procedure, under which he must request a transcript of the evidence offered or received, to be settled and signed by the judge, after notice as therein provided. (*Id.*)
11. **ORDER SUSTAINING DEMURRER NOT APPEALABLE—DISMISSAL OF APPEAL.**—No appeal lies from an order sustaining a demurrer without leave to amend, and if such appeal is attempted, it will be dismissed. (*Brunson v. City of Santa Monica*, 383.)
12. **ORDER SUSTAINING DEMURRER—HOW REVIEWABLE.**—The only method of review in such case is through an appeal from the final judgment, if unfavorable, thereafter entered in the action itself. (*Id.*)
13. **ORDER REFUSING NEW TRIAL—RECORD NOT SHOWING GROUNDS OF MOTION.**—An order denying a motion for a new trial will be affirmed on appeal if the record does not disclose the grounds upon which the motion was made. (*Davies v. Stark*, 519.)
14. **REGULARITY OF PROCEEDINGS—PRESUMPTION ON APPEAL.**—On appeal every presumption is in favor of the regularity of the judgment and the proceedings upon which it is based, and to justify a reversal it devolves upon the appellant to affirmatively show error. (*Id.*)

APPEAL (Continued).

15. **ALTERNATIVE METHOD—NOTICE OF ENTRY OF JUDGMENT—FAILURE TO SERVE—WHEN APPEAL IN TIME.**—It is the service of the notice of entry of judgment which starts the sixty-day period running within which an appeal must be taken under the alternative method, and not the fact that the opposing party may have had actual notice of the entry of judgment; and where such notice is not given an appeal taken within six months after the entry of judgment is within time. (*Hartfield v. Alderete*, 732.)
16. **NOTICE OF ENTRY OF JUDGMENT—WRITTEN NOTICE—SECTION 953A CODE CIVIL PROCEDURE.**—The notice of entry of judgment contemplated by section 953a of the Code of Civil Procedure, while not so stated, must nevertheless, under section 1010 of the Code of Civil Procedure, be a written notice. (*Id.*)
17. **WAIVER OF NOTICE—RECORD MUST SHOW—STAY-BOND NOT EVIDENCE OF WAIVER OF NOTICE.**—While a party entitled to such a written notice may waive the same, evidence of such waiver must appear from the record; and the fact that the appellant on an appeal under the alternative method has filed a stay-bond cannot be considered as evidence of a waiver of the written notice of the entry of judgment required by section 941b of the Code of Civil Procedure. (*Id.*)
18. **ALTERNATIVE METHOD—FAILURE TO GIVE WRITTEN NOTICE OF ENTRY OF JUDGMENT—NOTICE OF APPEAL AND REQUEST FOR TRANSCRIPT—WHEN WITHIN TIME—DISMISSAL.**—In such a case, where no written notice of entry of judgment was given, an appeal will not be dismissed on the ground that the notice of intention to appeal and request for a transcript provided for by section 953a of the Code of Civil Procedure had not been given and made within ten days after the opposing party had actual notice of the entry of judgment. (*Id.*)
19. **ACTION IN JUSTICE'S COURT—APPEAL TO SUPERIOR COURT—JUDGMENT FINAL.**—A judgment of the superior court on appeal, in an action originally brought in the justice's court to recover the sum of one hundred dollars, alleged to have been paid as part of the purchase price of certain lots of land, which defendant agreed to transfer to plaintiff, the contract being evidenced by a writing in the form of a receipt, which provided the balance of the purchase price should be paid upon a showing within fifteen days from date that the title of the property was free from all encumbrances and upon the execution of a good deed, and providing further that the deposit should be returned to the purchaser if the certificate of title showed the property not to be free from encumbrances, is final, and no appeal lies from the judgment of the superior court. (*Hillger v. Yenrick*, 604.)
20. **ACTION FOR RECOVERY OF MONEY—TITLE TO PROPERTY NOT INVOLVED—JUSTICE'S COURT JURISDICTION NOT OUSTED BY COUNTERCLAIM.**—Such an action is one at law for the recovery of money

APPEAL (Continued).

only, and a verified answer and counterclaim, upon which defendant took issue on the facts alleged in plaintiff's complaint and sought to recover the balance of seven hundred dollars, which plaintiff had agreed to pay upon the conditions of the contract in his favor being performed, and on which defendant moved to have the case certified to the superior court, upon the ground that it raised a question as to the title or right to the possession of real property, does not raise such question, and the fact that the defendant sought by counterclaim to recover more than the amount fixed as the limit of the jurisdiction of the justice's court could not oust that court of jurisdiction. While the alleged counterclaim might have been stricken from the files, no error was committed by the justice in proceeding to trial without taking such action. (Id.)

21. **MOTION TO DISMISS—INSUFFICIENT UNDERTAKING—WAIVER.**—The giving of the undertaking on appeal prescribed in section 940 of the Code of Civil Procedure may be waived; and where the respondent in making a motion to dismiss an appeal fails to specify as a ground for dismissal the fact that no "adequate bond on appeal" was given within five days after service of the notice of appeal, as specified in the notice of motion to dismiss, it is unnecessary to consider this ground. (Colburn v. Parrett, 749.)
22. **APPEAL FROM JUDGMENT AND ORDER DENYING NEW TRIAL—SUFFICIENCY OF NOTICE OF APPEAL.**—On an appeal from a judgment and order denying a new trial the notice of appeal is sufficient which is as follows: "Notice is hereby given that T. D. Parrett, through his attorneys, Porter, Morgan & Parrot, appeals to the appellate court of the state of California from that order of the superior court denying a motion for a new trial and also from the judgment therein," which notice was signed by the attorneys for appellant and duly served upon the attorney for respondent. (Id.)
23. **STATUTES PROVIDING FOR APPEALS—LIBERAL CONSTRUCTION.**—Statutes making provision in aid of appeals should be liberally interpreted. (Id.)

See Attorney and Client, 4; Costs; Criminal Law, 119-121, 136; Divorce, 2; Easements, 2; Elections, 8; Findings, 3; Fraud, 8; Mandamus; New Trial, 2, 3, 6, 9-12; Nonsuit; Parties, 2; Partnership, 5; Pleading, 9; Summons, 7-9; Unlawful Detainer, 3.

APPEARANCE. See Summons, 1.

ARCHITECT.

ACTION FOR SERVICES—COMPLIANCE WITH STATUTE REGULATING PRACTICE OF ARCHITECTURE.—In an action brought by one practicing architecture to recover for services rendered, it is not necessary to allege and prove compliance by him with the act (Stats. 1901, p. 641)

ARCHITECT (Continued).

regulating the practice of architecture and thereby show that he is not guilty of a misdemeanor, but noncompliance with the statute is a matter of defense to be pleaded and proved by the defendant. (Harris v. Bucher, 380.)

ASSAULT. See Criminal Law, 19-25.**ASSIGNMENT.**

1. **RIGHT TO MONEY ON ACCOUNT OF SALE OF REALTY—ORAL TRANSFER.**
The right to money collected on account of the sale of real estate is subject to assignment, and the assignment may be expressed orally as well as in writing. (Puterbaugh v. McCray, 469.)
2. **EQUITABLE ASSIGNMENT—REQUEST TO PAY MONEY.**—The request of a husband to his debtor to pay the money to his wife constitutes an equitable assignment to her of the debt. (Id.)
3. **EXPRESS WORDS—WHETHER NECESSARY TO EQUITABLE ASSIGNMENT.**—To constitute an equitable assignment no express words are necessary, if from the entire transaction it clearly appears that the intention of the parties is to pass title. (Id.)
4. **ACTION BY EQUITABLE ASSIGNEE—NECESSITY OF ALLEGING ASSIGNMENT.**—Where one who is entitled to money on account of the sale of real estate makes an equitable assignment thereof to his wife before the person whom he has authorized to collect the money receives it, such person, when he thereafter obtains the money with notice of the assignment, holds it for the use of the assignee, and in her action against him for money had and received she need not allege the facts concerning the assignment. (Id.)
5. **PARTY IN INTEREST—EQUITABLE ASSIGNEE.**—Where such equitable assignment is shown, the real party in interest, who should prosecute an action to recover the money, is the assignee. (Id.)

See Banks, 6.

ATTACHMENT.

1. **GARNISHMENT—ACTION AGAINST GARNISHEE—SUFFICIENCY OF COMPLAINT.**—A complaint in an action against a garnishee banking corporation which alleges "that summons and writ of attachment were duly issued; that thereafter on the said date the plaintiff caused the said writ of attachment to be served and said writ of attachment was on said date duly served upon said defendant banking corporation," is not insufficient, in the absence of special demurrer, in failing to show service of the writ of attachment. (Midway Five Oil Company v. Citizens National Bank of Los Angeles, 366.)
2. **FUNDS SUBJECT TO GARNISHMENT—CERTIFIED CHECK.**—Where a bank, holding a promissory note for collection, accepts a certified

ATTACHMENT (Continued).

check in payment, it is chargeable as garnishee for the amount thereof less any indebtedness to it of the payee of the note. (Id.)

3. **AMOUNT STATED IN WRIT GREATER THAN IN AFFIDAVIT—AMENDMENT OF WRIT—SECTION 558 CODE CIVIL PROCEDURE.**—Although a writ of attachment is issued for a greater amount than that stated in the affidavit for the writ, where the trial court, under the terms of section 558 of the Code of Civil Procedure, as amended in 1909, permitted an amendment of the writ which made it and the affidavit agree in amount, which amendment the court was authorized to make, an order denying a motion to dissolve the attachment upon that ground cannot be disturbed on appeal. (*Tyson v. Reinecke*, 696.)
4. **GUARANTY—CONTRACT FOR DIRECT PAYMENT OF MONEY.**—A contract of guaranty is a contract for the "direct payment of money," within the meaning of the sections of the code providing for attachment, and the payment being "direct," it is immaterial whether the obligation is principal or collateral. (Id.)
5. **CONTRACTS—SALE OF MERCHANDISE—ACTION FOR COMMISSIONS AGAINST NONRESIDENTS—RIGHT OF ATTACHMENT.**—In an action by a sales agent to recover commissions, where the complaint alleges that defendants are residents of the state of New York where they are engaged in the business of selling clothing and wearing apparel, and where they have their principal place of business, and each of them has been continuously absent from this state from the time of the execution of the written agreement in California, at which place plaintiff had his headquarters, and under the agreement plaintiff was to handle defendants' line of goods in certain territory, selling the same by sample on a certain percentage on all orders checked and shipped, deducting all returns, commissions to be paid from the first to the tenth of each month for the goods shipped during the previous month, and it being further alleged that during all the time the contract was in force, there existed between the parties an open, mutual, and current account, but that defendants withheld from plaintiff commissions to which he was entitled and made erroneous charges against plaintiff; that the commissions and charges amounted to four hundred and sixty dollars in excess of all credits due defendants, the cause of action stated constitutes the legal basis for the issuance of a writ of attachment as provided by our statute, as the complaint discloses that the action was upon an express contract made in this state "for the direct payment of money," and that the defendants at the time of the beginning of the action were nonresidents of the state. (*Lowenberg v. Jacobson's Sons*, 790.)
6. **AMOUNT DUE—CONTRACT NEED NOT SPECIFY.**—In such a case it is not necessary that the contract itself should specify the total amount of money to be paid; the requirement of the statute is satisfied when

ATTACHMENT (Continued).

the contract furnishes the measure of liability or the information from which the amount due can be ascertained. This is not at all the case of unliquidated damages for which an attachment cannot be had. (Id.)

7. **AFFIDAVIT FOR ATTACHMENT—SUFFICIENCY OF—SECTION 538, CODE CIVIL PROCEDURE.**—An amended affidavit for an attachment is sufficient in such a case which avers, "That the above named defendants are and were on the 13th day of November, 1912, indebted to said plaintiff in the sum of \$460, over and above all legal set-offs and counterclaims, upon an express contract for the direct payment of money, to wit: for commissions due plaintiff from said defendants for selling and disposing of said defendants' goods; that such contract was made and executed in this state, and that the payment of the same was not and has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property; that the said defendants are and were, on the said 13th day of September 1912, nonresidents of the state of California, to wit: residents of the state of New York; that the said sum for which the attachment was and is asked and sought herein was and is an actual *bona fide* existing debt, due and owing from the said defendants to the said plaintiff; that the said attachment was and is not sought, and the said action was and is not prosecuted to hinder, delay or defraud any creditor or creditors of the said defendants, or any creditor or creditors of either of said defendants." Such affidavit exceeds the demands of section 538 of the Code of Civil Procedure, but this does not vitiate or impair it. (Id.)
8. **MOTION TO DISSOLVE ATTACHMENT—AMENDED AFFIDAVIT—FILING BEFORE DECISION OF MOTION SUFFICIENT.**—There is a substantial compliance with the requirement of section 538 of the Code of Civil Procedure, permitting the filing of an amended affidavit for an attachment, where the same is filed after the submission of a motion to dissolve the attachment, but before the actual determination thereof. (Id.)
9. **UNDERTAKING FOR ATTACHMENT—SUFFICIENCY OF.**—In such a case, the contention that the undertaking for the attachment was insufficient in that it only imposed upon the surety an obligation for damages that might be suffered by all of the defendants collectively, and not individually by each of the defendants, cannot be maintained, where it sufficiently appears from the complaint that the action was really against only one defendant and there is no prayer for an individual judgment against the members of the association, and where the record besides does not show that any attack was made upon the amended undertaking, the notice of motion to dissolve having been addressed to the original bond, and it not affirmatively appearing that at the hearing of the motion any objection was made to the undertaking. (Id.)

ATTORNEY AND CLIENT.

1. **ACTION BY ATTORNEY TO RECOVER FEES—REASONABLE VALUE OF SERVICES—VALUE OF PROPERTY INVOLVED.**—In an action by an attorney to recover for legal services rendered in defending actions to quiet title to land, a consideration of the value of the property involved in the actions furnishes only one of the factors to be taken in view by the jury in arriving at a verdict as to the reasonable value of the services, and notwithstanding any opinion expressed by the witnesses, the jury have the right to form their own judgment as to that value, taking into consideration the location and conditions surrounding the land as shown by the evidence. (*McNutt v. Pabst*, 177.)
2. **CONFLICTING EVIDENCE—REVIEW ON APPEAL.**—If in such case the record on appeal discloses some substantial evidence both ways upon the question of the value of the land, the appellate court cannot substitute its judgment for that already declared by the jury. (*Id.*)
3. **EXPERT TESTIMONY AS TO VALUE OF LEGAL SERVICE—EXAMINATION OF WITNESSES.**—It is not error to allow attorneys, called as witnesses in such case, to state the reasonable value of the services rendered, assuming that the land is worth comparatively only a small amount per acre, since such testimony tends to illustrate just what weight the matter of the value of the property has with the witnesses in their conclusions. (*Id.*)
4. **RECORD OF APPEAL—ABSENCE OF INSTRUCTIONS IN TRANSCRIPT—PRESUMPTIONS.**—If the instructions given by the trial court to the jury are not set out in the transcript, it may be assumed on appeal that those instructions correctly stated the law, and that if the effect of any of the evidence should have been limited by the instructions, then such instructions were declared to the jury. (*Id.*)
5. **DILIGENCE OF ATTORNEY IN PERFORMING LEGAL SERVICE—EVIDENCE.** In an action by an attorney to recover for services rendered in defending actions to quiet title it is proper to exclude testimony that the plaintiff did everything that he thought necessary or proper to do in such actions, where all the facts as to what was done before and at the trial of the actions are shown by the evidence. (*Id.*)
6. **SEPARATE VERDICTS—DIRECTION OF COURT TO RETURN SINGLE VERDICT.**—If in such case the jury returns two verdicts, one in favor of the plaintiff, and the other for a smaller sum in favor of the defendant based on damage to him because of the plaintiff's negligence, the court may properly direct the jury to return to the jury room and return a single verdict for the difference. (*Id.*)

BANKS.

1. **ENFORCEMENT OF LIABILITY OF STOCKHOLDERS—ACTION BY BANK COMMISSIONER—DISMISSAL FOR DELAY IN SERVICE OF SUMMONS.**—The judgment entered in favor of the respondent J. J. Lerman, on

BANKS (Continued).

December 12, 1912, is affirmed, and the appeal from the judgment entered on February 14, 1913, is dismissed, on the authority of *Anderson v. Nawa, ante*, p. 151. (*Anderson v. Nawa*, 799.)

2. **ENFORCEMENT OF LIABILITY OF STOCKHOLDERS—ACTION BY BANK COMMISSIONER—DISMISSAL FOR DELAY IN SERVICE OF SUMMONS.**—The judgment entered in favor of the respondent T. Shibata, on January 14, 1913, is affirmed, and the appeal from the judgment entered on February 14, 1913, is dismissed, on the authority of *Anderson v. Nawa, ante*, p. 151. (*Anderson v. Nawa*, 801.)

3. **ENFORCEMENT OF LIABILITY OF STOCKHOLDERS—ACTION BY BANK COMMISSIONER—DISMISSAL FOR DELAY IN SERVICE OF SUMMONS.**—The judgment entered in favor of the respondent C. L. Tilden, on January 14, 1913, is affirmed, and the appeal from the judgment entered on February 14, 1913, is dismissed on the authority of *Anderson v. Nawa, ante*, p. 151. (*Anderson v. Nawa*, 802.)

4. **FORECLOSURE OF MORTGAGE—LOAN TO CORPORATION BY BANK—FRAUD ON CORPORATION—ESTOPPEL.**—Where the president and general manager of a corporation made application to a bank upon behalf of the corporation for a credit loan of fifteen thousand dollars, which application was approved, and the credit given the corporation upon the books of the bank, for which three notes were executed in different sums to the bank by the manager of the corporation in the name of the company; thereafter the notes were taken up with a renewal note of the company, which renewal note was indorsed by the manager and other directors of the corporation, and after the sum of three thousand five hundred dollars had been paid and indorsed on the note, one of the indorsers, having sold his interest in the corporation, was released by the bank, in consideration of the execution of the mortgage in question by respondent as security for the payment of the indebtedness due upon the renewal note, and a second renewal note was thereupon executed in the sum of eleven thousand five hundred dollars, upon which the name of the respondent replaced that of the released indorser; and the trial court found that the manager of the corporation was without authority to execute the first renewal note, that the company never received any benefit from the moneys obtained upon the note and that the same was procured to be signed by fraud and through false and fraudulent representations, the basis for this finding being that prior to the execution of the original notes, the manager of the corporation, the secretary of the bank, and others had entered into an agreement to secure control of the bank by purchasing a certain amount of its capital stock; that the loan was used by the manager of the corporation for the purpose of purchasing a controlling interest in the bank and not for the use and benefit of the company; that in order to conceal and cover up this phase of the transaction the manager represented to the corporation that it was necessary

BANKS (Continued).

to borrow fifteen thousand dollars from the bank, to be used in the business of the company, that he could secure such a loan from the bank if a resolution were passed authorizing the same, which resolution was duly passed, but made no reference to past loans by the bank to the company; and it being further found that all subsequent notes made by the company to the bank, including the note and mortgage in suit and the indorsements and guaranties thereon, were made without any knowledge on the part of the makers thereof of the original transaction and were made in the belief that the money borrowed, guaranteed, and secured had been procured under the resolution mentioned, that in fact no loans were made by the bank under said resolution and that the only money the bank parted with was the sum originally advanced—under the circumstances the knowledge of the transaction gained by the secretary of the bank being imputable to the bank, the latter is estopped from claiming that the loan was made in the regular course of business, and the evidence sustained the findings and the judgment in favor of the defendant. (*State Savings and Commercial Bank v. Winchester*, 691.)

5. **MECHANICS' LIENS—DEPOSIT OF CHECK WITH BANK TO PAY—TRUST FOR CLAIMANTS NOT CREATED.**—Where an owner of property delivered her check to a bank in which she was a depositor, which check was afterwards certified by the bank, with instructions to pay it to a certain building company with which she had made a contract to construct a building upon her property, upon the production of satisfactory releases of liens and notices to withhold, executed by various parties who performed labor upon and furnished material for the construction of the building, and about three years after the deposit of the check, the construction company served notice upon the bank that it no longer had any interest in the check, whereupon the bank applied the amount of money represented by the check upon an indebtedness of the depositor to it under its banker's lien, under the circumstances, no trust in the funds was created in favor of the lien claimants, and the bank was justified in applying the amount of the check upon the indebtedness of its depositor. (*Wade v. City and County Bank*, 675.)
6. **NO EQUITABLE ASSIGNMENT OR ESTOPPEL—LACK OF PRIVACY.**—In such a case the transaction neither creates a trust in favor of the lien claimants, or an equitable assignment; nor is there anything that could in any manner be construed as creating an estoppel in their favor, where the record does not show that they knew anything of it. The entire transaction was simply a means adopted by the owner of the building of setting aside money with which to pay her contractor. (*Id.*)

BANK COMMISSIONER. See Summons, 1-6.

BERKELEY, CITY OF. See Municipal Corporations, 2-17.

BILL OF EXCEPTIONS. See Appeal, 1, 2, 5, 9, 10.

BOND. See Building Contract, 1, 3.

BOUNDARIES. See State Land, 1, 2.

BROKERS.

1. **COMMISSION FOR LEASING PROPERTY—TRANSFER OF LEASE—EXECUTION OF NEW LEASE.**—Where a corporation lessee assigns the lease, which contains an option of renewal, to another corporation, the transferee is not bound, upon the expiration of the term and the procuring by it of a new lease, to continue to pay to the broker who procured the original lease the monthly amount which he was to receive during the original term and its extension in case of a renewal, although the stockholders of the transferee are also stockholders of the transferor. The new lease cannot be considered a renewal of the old lease, so as to continue the brokers right to monthly payments. (*Collom v. Roos Bros.*, 73.)
2. **RENEWAL OF LEASE—WHETHER NEW LEASE WILL BE REGARDED AS.** While it is true that a new lease made between the immediate parties to a former one containing the privilege of a renewal, may be varied as to its terms and still be held to constitute a renewal thereof, this flexibility in the exercise of the privilege cannot be held to apply as between the lessor and a transferee of the first lease. (*Id.*)
3. **SALE OF ROCK—ACTION TO RECOVER COMMISSION—ESTOPPEL AGAINST DEFENDANT AFTER FULL PERFORMANCE.**—In an action by brokers against a corporation to recover their commission for making a sale of crushed rock for the corporation, the corporation is estopped, after the transaction has been completely consummated, to defend on the grounds that the brokers were not authorized in writing to make the sale and that the road supervisors who purchased the rock for their county had no authority to represent the county. (*Johnston v. Tejunga Rock Company*, 84.)
4. **EXCHANGE OF LANDS—WITHDRAWAL OF WRITTEN AUTHORIZATION—SERVICES RENDERED UNDER ORAL REQUEST.**—Where a broker's written authorization to negotiate an exchange of city property for a certain ranch is withdrawn, and he is orally requested to secure an exchange of a part of the ranch upon different terms, his subsequent rendition of services will not entitle him to commissions. When the written authorization was withdrawn the relations between the broker and his principal were as though the writing had never been executed; hence there was no written authority to modify, and the alleged oral contract was therefore an original agreement governed by the provisions of section 1624 of the Civil Code, which requires

BROKERS (Continued).

such contracts, in order to enable the broker to recover, to be in writing. (*Fogg v. McAdam*, 522.)

5. **CONTRACT TO EXCHANGE LANDS—ORAL MODIFICATION.**—Where a broker's contract is for the exchange of specific property, not a general authorization to sell, there can be no oral modification of the agreement. (*Id.*)
6. **ACTION FOR COMMISSIONS—NECESSITY OF ALLEGATION AS TO TITLE OF PROPERTY.**—A complaint in an action by a real estate broker to recover his commissions for negotiating an agreement to exchange lands is insufficient, under the rule that pleadings are to be construed most strongly against the pleader, if it does not allege that the property to be conveyed to his principal was free from encumbrance and that such fact was evidenced by a certificate of title, when the contract (never consummated) contemplates such a title and certificate. (*Id.*)

See Insurance, 1, 2.

BUILDING CONTRACT.

1. **PUBLIC WORK—ACTION ON BOND—TIME FOR COMMENCEMENT—CONSTRUCTION OF AMENDMENT OF 1911.**—The amendment of 1911 (*Stats.* 1911, p. 1422) to the statute passed March 27, 1897, requiring the giving of a bond to secure payment of lien claims upon public work, applies to a contract which was completed before the passage of said amendment; and where the contract was completed prior to February 26, 1912, but the claim was not filed until April 12, 1912, and a suit on the bond was begun July 18, 1912, the claim was filed and the suit begun in time, as said amendment extended the time of filing the claim from thirty days to ninety days and the time for bringing suit on the bond from ninety days to six months. (*Asbestos Manufacturing and Supply Company v. American Bonding Company of Baltimore*, 641.)
2. **ENLARGEMENT OF TIME—OBLIGATION OF CONTRACT NOT IMPAIRED.**—In such a case, where the enlargement of the time for filing the claim and beginning the suit was made before the time had arrived in which either of said steps could be taken under the old statute, the extension of time operated merely as a modification of the remedy and did not impair the obligation of the contract. (*Id.*)
3. **SUFFICIENCY OF BOND.**—It is held in this action that the bond sued on, which seems to follow closely the language of the statute, and specifies that it was given as required by the act of the legislature, entitled "An act to secure the payment of claims of materialmen, mechanics or laborers employed by contractors upon state, municipal or other public work, approved March 27th, 1897," sufficiently conforms to the requirements of the statute. (*Id.*)

See Contract, 1, 2; Mechanics' Liens; Surety.

BURGLARY. See Criminal Law, 26-41.

CANCELLATION. See Promissory Note, 2.

CERTIORARI. See Parties, 2.

CHECKS. See Banks, 5.

CLAIM AND DELIVERY.

1. **FINDING FOR DEFENDANT ON PARAMOUNT ISSUE—MATERIALITY OF OTHER FINDINGS.**—In an action of claim and delivery by a foreign corporation to recover the possession or value of certain books a finding that the defendant is not guilty of the conversion charged is a finding upon the paramount issue which in itself disposes of the case on its merits and supports an ultimate judgment for the defendant. Hence a further finding as to the value of the property in suit is immaterial and unnecessary, and a contention by the plaintiff that it is contrary to the evidence becomes unavailing. (*International Textbook Company v. Holmes*, 474.)
2. **ACTION BY FOREIGN CORPORATION—EFFECT OF NONCOMPLIANCE WITH LAW.**—For the same reason another finding that the plaintiff had not the legal right to maintain the action, because of noncompliance with the law requiring it to file a copy of its articles with the secretary of state, may be ignored. (*Id.*)
3. **PARTNERSHIP PROPERTY—AWARD TO PARTNER ON DISSOLUTION—LIEN FOR STORAGE—SUFFICIENCY OF TENDER.**—Where certain copartnership property was awarded by order of court to one of the partners in a dissolution suit, but, before the award, was delivered by the other partner to third persons for storage at an agreed price, and, on demand for delivery of the property by the partner to whom it had been awarded, the parties having possession of it asserted a claim of lien for storage charges and also for goods sold and delivered to the other partner, the fact that no actual production of the money was made, in an offer to pay the storage charges, does not render the tender ineffectual, where no objection was made on this ground in the rejection of the offer. (*Sheller v. Livingston*, 572.)
4. **CONSTRUCTION OF SECTION 2074 CODE CIVIL PROCEDURE AND SECTION 1500 CIVIL CODE—EXTINGUISHMENT OF OBLIGATION—OFFER TO PAY.** The contention that section 2074 of the Code of Civil Procedure and section 1500 of the Civil Code provide the method of procedure in such case is without merit. The former section does not prescribe the mode of tender, but rather a method of extinguishing an obligation when that object is sought; the latter section relates to an offer in writing to pay, and is a mere rule of evidence. (*Id.*)

COMMUNITY PROPERTY.

1. **DISPOSAL OF BY GIFT OR WILL.**—Although a husband has no power to make a gift of any part of the community property without the written consent of his wife, yet he has the power, without her consent, to make a will giving one-half of it to his father and mother. (*Giuffre v. Lauricella*, 422.)
2. **CONVEYANCE OF COMMUNITY PROPERTY BY HUSBAND—ESTOPPEL AGAINST WIFE.**—Where a man about to leave the country on account of bad health, and desiring to provide for his parents in case he does not return, conveys community property to his wife on her express agreement to hold it in trust for him during his life and at his death convey a half interest therein to his parents and herself retain the other half, she is estopped after his death to assert the invalidity of the deed under the rule that a husband cannot convey the common property without a valuable consideration unless the wife consents in writing. (*Id.*)

CONFESSION. See Criminal Law, 1, 2, 71.

CONSIDERATION. See Contract, 2; Deed, 2, 3; Promissory Note, 2; Sale, 1.

CONSIGNOR AND CONSIGNEE. See Pledge.

CONSPIRACY. See Criminal Law, 31, 102-109.

CONSTITUTIONAL LAW. See Criminal Law, 12; Fish and Game Law; Forfeiture; Intoxicating Liquors, 10; Municipal Corporations, 9-17; Orphan Asylum, 2-4; Water and Water-rights, 1.

CONTEMPT. See Mandamus, 1.

CONTRACT.

1. **WRITTEN AGREEMENT OF SUBCONTRACTOR—SUBSTITUTION OF ORAL ONE.**—Where a subcontractor doing plastering under a written contract threatens to abandon the work, claiming that the situation was misrepresented to him, in consequence of which he has undertaken the work at too low a price, and as a result of the differences thus arising he and the construction company enter into an oral agreement whereby he is to continue the work as superintendent and be paid the actual cost of the labor and materials, and the contract is "to be turned into a day's work job," the oral agreement is not a modification of the prior written contract, within the rule of section 1698 of the Civil Code that a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise. (*Credit Clearance Bureau v. George A. Hochbann Contracting Company*, 546.)

CONTRACT (Continued).

2. **CONSIDERATION—SETTLEMENT OF DISPUTE BETWEEN PARTIES.**—Such oral agreement, being based “on the existence and settlement of disputes between the parties,” is not invalid for want of consideration. (Id.)
3. **NECESSITY OF REDUCING TERMS TO WRITING.**—When it is a part of the understanding between parties in negotiating the terms of an agreement that it is to be reduced to writing and signed by them, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract. (Conner v. Plank, 516.)
4. **OMISSION TO REDUCE AGREEMENT TO WRITING—WHEN DOES NOT INVALIDATE.**—But where a contract is of such a nature that the law does not require it to be in writing, and its terms are in the first instance definitely agreed upon and completed, then the mere fact that immediately thereafter the parties agree to evidence the contract by a written instrument does not interfere with the force and effect of the oral agreement. (Id.)
5. **CONTEST OF WILL—AGREEMENT NOT TO WAGE—FAILURE TO PUT IN WRITING.**—In this action involving an oral contract not to contest a will there is no evidence that the agreement arrived at from the oral negotiations of the parties was not to constitute a contract unless completed in writing, although the next day after the agreement was reached the attorneys of the parties started to put it in writing, whereupon one of the parties repudiated the compromise and the preparation of the writing was thereupon suspended. (Id.)

See Agency; Attachment, 5, 6; Building Contract; Damages; Insurance, 1; Lease; Mechanics' Liens, 3; Sale; Specific Performance.

CORPORATION.

1. **LIABILITY OF STOCKHOLDERS WHO BELONG TO TWO COMPANIES.**—The mere fact that the persons who are stockholders of one corporation doing one kind of business, are also stockholders of another corporation engaged in another and distinct line of business, is not in itself sufficient to impute liability to one for the acts of the other in the absence of some direct proof of a fraudulent design in the carrying out of which the two entities are controlled and act as one. (Collom v. Roos Bros., 73.)
2. **ACTION TO ENFORCE STOCKHOLDERS' LIABILITY—SUFFICIENCY OF COMPLAINT.**—In an action to enforce the liability of a stockholder in a corporation, an allegation in the complaint that at the time the indebtedness was incurred “there were subscribed, issued and outstanding nine thousand five hundred and eighty-eight shares, and no more, of the capital stock” of the corporation, constitutes a sufficient statement, in the absence of a special demurrer, of the

CORPORATION (Continued).

total amount of the capital stock that was subscribed for at the time the obligation in suit was incurred. (*Hanson v. Sherman*, 169.)

3. **SPECIAL DEMURRER—EFFECT OF OVERRULING WITH CONSENT OF DEFENDANT.**—The overruling, with the express consent of the defendant, of a special demurrer to such complaint, is tantamount to a withdrawal of the demurrer, in so far as it was grounded upon the ambiguities and uncertainties of the complaint. (*Id.*)
4. **EVIDENCE AS TO WHETHER DEFENDANT IS STOCKHOLDER—CONCLUSION OF WITNESS.**—Where, on the issue in such case whether the defendant was a stockholder, the vice-president of the corporation is asked to state under what circumstances the stock in question was issued to the defendant, his answer that the stock "was issued by the corporation to Mr. F., trustee, for Mr. P., as a bonus for a loan of \$25,000, which he had made to the M. Company," is properly stricken out as not responsive and as the conclusion of the witness. (*Id.*)
5. **CIRCUMSTANCES CONTROLLING ISSUANCE OF STOCK—ADMISSIBILITY IN EVIDENCE.**—Upon the issue of whether or not the defendant was a stockholder in the corporation, evidence of the circumstances covering and controlling the issuance of the stock to him is competent, relevant, and material, provided it is accompanied with or followed by other evidence showing or tending to show that the circumstances of the transaction had been communicated to the defendant. (*Id.*)
6. **MAILING LIST OF NAMES OF STOCKHOLDERS—ADMISSIBILITY TO SHOW WHO ARE STOCKHOLDERS.**—A list of names written upon the fly-leaf of the corporation's stock journal, as the persons to whom notices of stockholders' meetings were sent, is not admissible to show that the defendant was a stockholder, where the same is not followed by any evidence showing that notices had been sent to him. (*Id.*)
7. **ENTRY IN CORPORATION BOOKS AS EVIDENCE OF WHO ARE STOCKHOLDERS.**—The entry of the defendant's name in such list did not constitute an entry of his name in the books of the corporation as a stockholder, within the meaning of section 322 of the Civil Code, so as to be *prima facie* evidence that he was the owner of stock in the corporation. (*Id.*)
8. **ASSERTION THAT PERSON IS STOCKHOLDER—WHETHER EVIDENCE OF SUCH FACT.**—An assertion that the defendant was a stockholder in the corporation, made to him at a meeting of stockholders and creditors, is not evidence against him that he was a stockholder, unless the truth of the charge was admitted by him, either by his express answer, or his acquiescence indicated by his silence, or by acts and conduct which could be fairly construed as an assent. (*Id.*)
9. **ULTRA VIRES ISSUE OF STOCK AS PLEDGE—WHETHER CONSTITUTES PLEDGE A STOCKHOLDER.**—The *ultra vires* issuance of stock by a

CORPORATION (Continued).

corporation as a pledge for the repayment of a loan does not have the effect of transforming the person receiving the same from a pledgee to a stockholder liable for the corporate debts. (Id.)

10. **DIVIDENDS ON ATTACHED STOCK—TO WHOM BELONG.**—All dividends accruing from attached stock are impounded with the stock itself, and pass with it to the execution purchaser. (*Cates v. Consolidated Realty Company*, 531.)
11. **RIGHT TO DIVIDENDS—WHEN STANDS SEPARATE FROM STOCK.**—But the right of the execution purchaser to the dividends remains separate from the stock. (Id.)
12. **ASSIGNMENT OF STOCK—RIGHT TO DIVIDENDS.**—Hence a mere assignment of the stock by the execution purchaser does not pass any interest in past dividends or any right of action thereon. (Id.)

See *Banks*; *Claim and Delivery*, 1, 2; *Forfeiture*; *Municipal Corporations*; *Pleading*, 11; *Summons*, 11-13; *Water and Water-rights*.

COSTS.

COSTS ON APPEAL—FAILURE TO INSERT PROVISION IN REMITTITUR—MOTION TO RECALL AND INSERT PROVISION.—Where a judgment is affirmed by the appellate court, but the *remititur* contains no provision that the respondent shall recover his costs on appeal, the *remititur* may be recalled on motion and the clerk be directed to issue a new one containing a provision for such costs. (*Morgrage v. National Bank of California*, 133.)

See *Easement*, 3.

COUNTERCLAIM. See *Appeal*, 20.

COUNTY. See *Intoxicating Liquors*, 10-14.

COURTS. See *District Court of Appeal*; *Justice's Court*; *Police Court*; *Superior Court*.

CRIMINAL LAW.

1. **CONFESSION BY PRISONER—THREATS MADE OR INDUCEMENTS HELD OUT BY OFFICERS OF LAW.**—A confession extorted by threats or resulting from inducements held out by the officers of the law to a prisoner in their custody is not admissible in evidence; and when a confession is offered in a criminal case, it is incumbent on the prosecution to lay the foundation for its introduction by preliminary proof showing *prima facie* that it was freely and voluntarily made. (*People v. Hoge*, 456.)
2. **CONFESSION TO OFFICERS—ADMISSIBILITY WHEN VOLUNTARILY MADE.**—But the mere fact that a person accused of crime is under

CRIMINAL LAW (Continued).

arrest and in the custody of officers, and makes a confession in answer to questions, will not warrant the rejection of the confession if it fairly and clearly appears that the statements therein are of a voluntary nature. (Id.)

2. **POLICE AND JUSTICES' COURTS—JURISDICTION OVER MISDEMEANORS.**—The police and justices' courts have exclusive jurisdiction over all misdemeanors punishable by a fine not to exceed five hundred dollars or by imprisonment not to exceed six months; and, unless expressly provided to the contrary, every offense declared to be a misdemeanor is punishable by a fine not to exceed five hundred dollars or by imprisonment not to exceed six months. (People v. Gibbs, 466.)
4. **PUBLIC NUISANCE—INFORMATION CHARGING—JURISDICTION TO TRY.** Where a defendant is informed against under section 373a of the Penal Code, for maintaining a public nuisance, the offense falls within the category of misdemeanors which are triable only in the police or justices' courts. (Id.)
5. **SECTION 373a AND 377 OF PENAL CODE NOT TO BE READ TOGETHER.** The information in such case cannot be sustained as within the jurisdiction of the superior court, on the theory that it charges an indictable misdemeanor, by reading and construing section 373a of the Penal Code with section 377, the latter dealing with the violations of health laws relating to the registration of deaths and the disposition of human remains. (Id.)
6. **SECTION 3491 OF CIVIL CODE—EFFECT TO CONFER JURISDICTION ON SUPERIOR COURT.**—The fact that section 3491 of the Civil Code provides among other things that a public nuisance may be remedied either by an indictment or an information does not avail to confer upon the superior court jurisdiction to hear and determine an offense charged under section 373a of the Penal Code. (Id.)
7. **JUDGMENT—DELAY IN RENDERING—REVIEW ON APPEAL.**—A judgment in a criminal case will not be reversed on appeal because it was not rendered or pronounced until seven days after the rendition of the verdict, in the absence of a motion or demand for a new trial on the ground of such delay. (People v. Polish, 464.)
8. **ACCUSED AS WITNESS—CROSS-EXAMINATION.**—Where a defendant in a criminal prosecution submits himself as a witness, he is subject to the same tests for ascertaining the truth as any other witness who takes the witness stand. (People v. Moran, 472.)
9. **PRIOR CONVICTIONS—ELICITING ON CROSS-EXAMINATION.**—Where the accused in a burglary case has admitted two prior convictions upon arraignment, he may be asked on cross-examination at the trial if he has ever been convicted of a felony. (Id.)
10. **NUMBER OF PRIOR CONVICTIONS—BRINGING OUT ON CROSS-EXAMINATION.**—He may also be asked, as affecting his credibility, how many times he has previously been convicted. (Id.)

CRIMINAL LAW (Continued).

11. **INSTRUCTION AS TO PURPOSE OF CROSS-EXAMINATION—FAILURE TO REQUEST.**—The omission of the court to instruct the jury that the purpose of admitting the testimony with reference to prior convictions was for the sole purpose of impeachment, is not error, if the defendant has made no request for such instruction. (Id.)
12. **MEDICAL LAW—ACT OF 1913—CONSTITUTIONALITY OF—SUFFICIENCY OF TITLE.**—The title of the act approved June 2, 1913; (Stats. 1913, p. 722), for the regulation of the practice of medicine and surgery, etc., indicates with sufficient detail its entire subject matter, and there is not in the body of the statute anything which is in conflict with its title or not included within the scope thereof, and said act is constitutional. (People v. Ah Fong, 724.)
13. **PROSECUTION UNDER MEDICAL ACT—SUFFICIENCY OF EVIDENCE.**—It is held in this prosecution for a violation of said act that the verdict is sustained by the evidence. (Id.)
14. **SUFFICIENCY OF EVIDENCE.**—In this prosecution it is held that the evidence was sufficient to support the verdict and judgment. (People v. Zerman, 729.)
15. **EVIDENCE—CONTRADICTIONS AND INCONSISTENCIES—WHEN INHERENT IMPROBABILITY NOT SHOWN—CONFLICTING EVIDENCE.**—Contradictions and inconsistencies in the testimony of a witness alone will not constitute inherent improbability, and where such contradictions and inconsistencies appear either in the evidence offered on behalf of the people or in the evidence adduced upon the whole case the result is only a conflict in the evidence, which does not constitute a ground for a reversal on appeal. (People v. Amadio, 729.)
16. **ALLEGED MISCONDUCT OF DISTRICT ATTORNEY—IMPEACHMENT OF WITNESS—CALLING ATTENTION TO TESTIMONY IN FORMER TRIAL.**—It is held in this prosecution that there was no prejudice or misconduct on the part of the district attorney which would justify reversal of the judgment, and that the district attorney was within his rights in attempting to impeach the defendant by calling his attention upon the second trial to his testimony given upon a prior trial. (Id.)
17. **DATE OF CRIME—VARIANCE BETWEEN INFORMATION AND PROOF—WHEN IMMATERIAL.**—The district attorney has the right to elect as to the particular transaction upon which he shall offer evidence, and where he so elects, upon the suggestion of the counsel for the defendant, to rest upon a particular transaction as the foundation of his case, in which election the counsel for the defendant acquiesces, no particular harm could come to the defendant by reason of his selecting a date different from that alleged in the information. (Id.)
18. **WHEN TIME PRIOR TO FILING INFORMATION AND WITHIN STATUTE SUFFICIENT—VARIANCE—INJURY MUST BE SHOWN.**—It is the general rule that if the act is shown to have been committed prior

CRIMINAL LAW (Continued).

had any connection with the stamps; but such error was not prejudicial, where the other circumstances of the case, unaided by the circumstances of the finding of the stamps, were sufficient to generate in the minds of reasonable men the conviction that the defendant was, beyond a reasonable doubt, guilty of the crime charged. (Id.)

31. **IDENTIFICATION OF DEFENDANT—CONCLUSION OF ARRESTING OFFICER—WHEN REFUSAL TO STRIKE OUT NOT PREJUDICIAL.**—In such a case, where the arresting officer testified that, upon going into the baggage car where the defendants were arrested, he opened the door thereof slightly and peeped through and into the passenger coach "and located the two gentlemen that I was looking for," there was no error in refusing to strike out, on motion of the defendant, the words "I was looking for," on the ground that it was equivalent to telling the jury that the defendants had committed the burglary, as the statement could not have been so understood by the jury, where the testimony of the officer showed that he had no such knowledge of the two men or their connection with the crime as would induce the jury to attach any significance to any statement by him which might be so construed as to involve a declaration or any expression of opinion by the witness that they were guilty of the charge. (Id.)
32. **POSSESSION OF "SKELETON KEY"—FAILURE TO MOVE TO STRIKE OUT.**—In such a case, where the counsel for defendant, on cross-examination of the arresting officer, asked if he found any burglar's tools of any kind in possession of the accused, and the district attorney on re-direct examination asked, "You said you did not find any burglar's tools. Did you find a burglar key? A. We found a skeleton key," to which counsel for the defendant interposed: "We object to that as leading. Did he find a key?" and the witness answered "Yes, a skeleton key," and after the question had been answered counsel for defendant objected to the testimony on the ground that it was incompetent, irrelevant, and immaterial, these objections having been made after the question was answered, there was nothing before the court on which to predicate a ruling, and the remaining remedy was a motion to strike the testimony from the record; but where that was not done there is no warrant for a review by the appellate court of the error in admitting the testimony, if error it was. (Id.)
33. **BURGLARY—SUFFICIENCY OF INFORMATION—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.**—In this prosecution for burglary it is held upon the authority of the case of *People v. Warner*, ante, p. 751, in which the defendant was jointly charged with the appellant in this case, that the information was sufficient and that the evidence was amply sufficient to support the verdict. (*People v. Malone*, 764.)
34. **EVIDENCE—POSSESSION OF STOLEN PROPERTY BY DEFENDANT'S COMPANION—ADMISSIBILITY OF.**—Where the evidence shows that the

CRIMINAL LAW (Continued).

defendant and his companion, when seen at all, were in the company of each other from the time when they were first observed in the immediate neighborhood of the burglary up to and including the time at which they were apprehended by the arresting officer, and all the circumstances of the case independent of the possession by defendant's companion of a smooth two-bit piece, identified as the same piece of coin that was in the rifed safe at the time of the burglary, indicated the guilt of the defendant no less than that of his companion, the fact of the finding of a part of the stolen property from the safe on defendant's companion, within a few hours after the property was taken, constituted a relevant and material circumstance against the defendant, to be accorded, however, such weight in the proof of guilt as the jury might conceive it to be entitled to after comparing and considering it with all the other circumstances in the case. (Id.)

35. **GIVING OF ASSUMED NAME—POSSESSION OF MONEY BY DEFENDANT AND COMPANION—POSSESSION OF SMOOTH COIN BY DEFENDANT'S COMPANION.**—There was no error in admitting evidence that defendant's companion, when arrested, gave an assumed name to the officer, that the defendant had in his possession a certain amount of money, that upon defendant's companion was found a smooth quarter of a dollar, identified by a witness as having been in the rifed safe at the time of the burglary, and also admitting in evidence the moneys taken from both the defendant and his companion, as all those circumstances were relevant and competent against the defendant, their weight or evidentiary value being a matter for the jury to determine. (Id.)
36. **IDENTIFICATION OF DEFENDANT—FAILURE OF RESIDENTS TO IDENTIFY—CROSS-EXAMINATION.**—Where it appeared that the arresting officer after the arrest and prior to the trial took the defendant and his companion to the town where the burglary occurred to ascertain whether any of the residents of that place would be able to identify them as persons whose presence at or near said town they had observed shortly anterior to the time at which the crime was committed, it was not error for the court to sustain an objection to a question of counsel for defendant on cross-examination to show that at one place to which they were taken they could not be identified, where the uncontradicted testimony of several witnesses showed that the men were in the immediate neighborhood only a few hours before the crime was committed. (Id.)
37. **EVIDENCE—SUSPICION OF SHERIFF OF PERSON OTHER THAN DEFENDANTS HAD COMMITTED CRIME—INADMISSIBILITY OF.**—It was not error for the court to refuse to allow the defendant to show that the sheriff of the county, upon learning of the burglary, entertained a suspicion that a person known to him, other than the defendants, was the author of the crime, where there was nothing

CRIMINAL LAW (Continued).

had any connection with the stamps; but such error was not prejudicial, where the other circumstances of the case, unaided by the circumstances of the finding of the stamps, were sufficient to generate in the minds of reasonable men the conviction that the defendant was, beyond a reasonable doubt, guilty of the crime charged. (Id.)

31. **IDENTIFICATION OF DEFENDANT—CONCLUSION OF ARRESTING OFFICER—WHEN REFUSAL TO STRIKE OUT NOT PREJUDICIAL.**—In such a case, where the arresting officer testified that, upon going into the baggage car where the defendants were arrested, he opened the door thereof slightly and peeped through and into the passenger coach "and located the two gentlemen that I was looking for," there was no error in refusing to strike out, on motion of the defendant, the words "I was looking for," on the ground that it was equivalent to telling the jury that the defendants had committed the burglary, as the statement could not have been so understood by the jury, where the testimony of the officer showed that he had no such knowledge of the two men or their connection with the crime as would induce the jury to attach any significance to any statement by him which might be so construed as to involve a declaration or any expression of opinion by the witness that they were guilty of the charge. (Id.)
32. **POSSESSION OF "SKELETON KEY"—FAILURE TO MOVE TO STRIKE OUT.**—In such a case, where the counsel for defendant, on cross-examination of the arresting officer, asked if he found any burglar's tools of any kind in possession of the accused, and the district attorney on re-direct examination asked, "You said you did not find any burglar's tools. Did you find a burglar key? A. We found a skeleton key," to which counsel for the defendant interposed: "We object to that as leading. Did he find a key?" and the witness answered "Yes, a skeleton key," and after the question had been answered counsel for defendant objected to the testimony on the ground that it was incompetent, irrelevant, and immaterial, these objections having been made after the question was answered, there was nothing before the court on which to predicate a ruling, and the remaining remedy was a motion to strike the testimony from the record; but where that was not done there is no warrant for a review by the appellate court of the error in admitting the testimony, if error it was. (Id.)
33. **BURGLARY—SUFFICIENCY OF INFORMATION—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.**—In this prosecution for burglary it is held upon the authority of the case of *People v. Warner*, ante, p. 751, in which the defendant was jointly charged with the appellant in this case, that the information was sufficient and that the evidence was amply sufficient to support the verdict. (*People v. Malone*, 764.)
34. **EVIDENCE—POSSESSION OF STOLEN PROPERTY BY DEFENDANT'S COMPANION—ADMISSIBILITY OF.**—Where the evidence shows that the

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defendant and his companion, when seen at all, were in the company of each other from the time when they were first observed in the immediate neighborhood of the burglary up to and including the time at which they were apprehended by the arresting officer, and all the circumstances of the case independent of the possession by defendant's companion of a smooth two-bit piece, identified as the same piece of coin that was in the rifled safe at the time of the burglary, indicated the guilt of the defendant no less than that of his companion, the fact of the finding of a part of the stolen property from the safe on defendant's companion, within a few hours after the property was taken, constituted a relevant and material circumstance against the defendant, to be accorded, however, such weight in the proof of guilt as the jury might conceive it to be entitled to after comparing and considering it with all the other circumstances in the case. (Id.)

- 35. GIVING OF ASSUMED NAME—POSSESSION OF MONEY BY DEFENDANT AND COMPANION—POSSESSION OF SMOOTH COIN BY DEFENDANT'S COMPANION.**—There was no error in admitting evidence that defendant's companion, when arrested, gave an assumed name to the officer, that the defendant had in his possession a certain amount of money, that upon defendant's companion was found a smooth quarter of a dollar, identified by a witness as having been in the rifled safe at the time of the burglary, and also admitting in evidence the moneys taken from both the defendant and his companion, as all those circumstances were relevant and competent against the defendant, their weight or evidentiary value being a matter for the jury to determine. (Id.)
- 36. IDENTIFICATION OF DEFENDANT—FAILURE OF RESIDENTS TO IDENTIFY—CROSS-EXAMINATION.**—Where it appeared that the arresting officer after the arrest and prior to the trial took the defendant and his companion to the town where the burglary occurred to ascertain whether any of the residents of that place would be able to identify them as persons whose presence at or near said town they had observed shortly anterior to the time at which the crime was committed, it was not error for the court to sustain an objection to a question of counsel for defendant on cross-examination to show that at one place to which they were taken they could not be identified, where the uncontradicted testimony of several witnesses showed that the men were in the immediate neighborhood only a few hours before the crime was committed. (Id.)
- 37. EVIDENCE—SUSPICION OF SHERIFF OF PERSON OTHER THAN DEFENDANTS HAD COMMITTED CRIME—INADMISSIBILITY OF.**—It was not error for the court to refuse to allow the defendant to show that the sheriff of the county, upon learning of the burglary, entertained a suspicion that a person known to him, other than the defendants, was the author of the crime, where there was nothing

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in the direct examination of the sheriff to justify such inquiry on cross-examination. (Id.)

38. **INSTRUCTIONS—BURDEN OF PROOF—REASONABLE DOUBT—PRESUMPTION OF INNOCENCE.**—There was no error in refusing the following instruction: "The court instructs you that when all the evidence in the case is before the jury, the burden of proof remains where it started, with the prosecution," where the court instructed the jury, among other statements of law pertinent to the case that "the state must prove by competent evidence every essential element of the crime charged, to the satisfaction of each and every juror, beyond a reasonable doubt," and further that "the law presumes every man to be innocent until his guilt is established beyond a reasonable doubt," and that "this presumption attaches at every stage of the case, and to every fact essential to a conviction." (Id.)
39. **REASONABLE DOUBT—INCORRECT FORM.**—There was no error in rejecting an instruction proffered by the defendant which merely contained in effect a statement of the rule as to reasonable doubt, where the rule was fully and clearly amplified by the court in its general charge; especially where the rejected instruction was not in proper form, inasmuch as it would have told the jury that defendant's companion was the only person on trial for the alleged offense, which was not true. (Id.)
40. **THEORY OF INNOCENCE—DUTY TO ACQUIT—CIRCUMSTANTIAL EVIDENCE.**—There was no error in such a case in refusing an instruction proffered by defendant that "in considering the evidence, if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendant's innocence, and if you have a reasonable doubt of his guilt, you should acquit him," where the court declared the principle substantially in the following instruction: "When circumstantial evidence is relied upon to obtain a conviction, it is not only necessary that the circumstances all concur to show that the defendant committed the crime, but that all are consistent with any other rational theory." (Id.)
41. **INSTRUCTIONS—PROPERLY REFUSED WHEN COVERED BY OTHERS.**—There is no error in refusing instructions proffered by the defendant where they have been fully covered by other instructions given by the court. (Id.)
42. **PRESENTATION OF FALSE CLAIM TO INSURANCE COMPANY—SUFFICIENCY OF INDICTMENT.**—An indictment charging a violation of section 549 of the Penal Code, which makes it a crime to present a false claim of loss to a fire insurance company, is not demurrable because of failure to allege that the presentation of the claim was made to a regularly constituted court of justice. (*People v. Panagiot*, 158.)
43. **PERSON TO WHOM CLAIM PRESENTED—GIST OF OFFENSE.**—The statute is not confined to claims arising in courts of justice, but in-

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- cludes the presentation to any person who might be cheated or defrauded thereby. The intent to defraud is the gist of the offense; and the design of the legislature was to provide a punishment for the presentation of false fire claims with the intent to defraud, irrespective of the person to whom such claim might be presented. (Id.)
44. **INDICTMENT—FAILURE TO SHOW COUNTY WHEREIN CLAIM WAS PRESENTED.**—The validity of the indictment for such offense cannot be questioned because the testimony taken before the grand jury fails to show that the presentation of the claim was made in the county wherein the indictment was found. (Id.)
45. **SUFFICIENCY OF EVIDENCE BEFORE GRAND JURY—INQUIRY INTO BY COURT.**—Courts cannot, in the absence of a statute permitting it, inquire into the sufficiency of the evidence upon which the grand jury acted, in order to invalidate an indictment returned by it. (Id.)
46. **EVIDENCE—VOLUNTARY STATEMENTS MADE BY DEFENDANT TO ATTORNEYS OF INSURANCE COMPANY.**—In a prosecution for presenting a false claim of loss to a fire insurance company, voluntary statements in regard to his claim, made by the defendant in the office of the attorneys for the insurance company before his arrest and at a time when he understood his inquisitors had no authority to question him, are admissible in evidence. (Id.)
47. **PROTECTION OF WITNESS AGAINST INCRIMINATING TESTIMONY—INTERPRETATION OF SECTION 1324 OF THE PENAL CODE.**—Section 1324 of the Penal Code is in the nature of remedial legislation, and its purpose is to extend protection to witnesses in proceedings other than in the course of criminal prosecutions or other actions, in order that the inquiry for which the tribunals were created may not be impeded or their investigations frustrated through the fear of witnesses that their testimony may incriminate themselves; but it can have no application to an inquiry which is not based or held upon legal authority. (Id.)
48. **PROOF OF CORPORATE CHARACTER OF INSURANCE COMPANY—EFFECT OF GENERAL REPUTATION.**—In a prosecution for presenting a false claim of loss to a fire insurance company, testimony as to the general reputation of the company for doing an insurance business is sufficient to show that it is a corporation. (Id.)
49. **INSTRUCTION AS TO PRESENTATION OF CLAIM—STATEMENT OF EVIDENCE.**—An instruction to the jury that a presentation of a claim was made is not erroneous, where the defendant has admitted such fact. (Id.)
50. **UNFAMILIARITY WITH PREPARATION OF CLAIMS FOR LOSS—EVIDENCE TO REBUT.**—Evidence tending to show that on other occasions and under different names the defendant suffered losses from fire and prepared proofs of loss, is admissible to rebut his contention that he was unfamiliar with the preparation of such claims. (Id.)

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51. **EVIDENCE OF OTHER CRIMES—WHEN ADMISSIBLE.**—While ordinarily evidence of another offense is not admissible in a criminal prosecution, yet, whenever the case is such that the proof offered in support of the charge tends also to prove the commission of another offense, such proof is admissible; and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion. (Id.)
52. **ARGUMENT OF DISTRICT ATTORNEY—REFERENCE TO ARSON—NON-PREJUDICIAL ERROR.**—Remarks of the district attorney in his argument to the jury, indicating that the defendant has committed arson, do not justify a reversal of the judgment of conviction, if the evidence establishes his guilt. (Id.)
53. **MISCONDUCT OF COUNSEL—NECESSITY OF TIMELY OBJECTION AND EXCEPTION.**—It is the duty of counsel for the defendant, when the district attorney indulges in improper remarks during his argument, to call the attention of the court thereto then and there, so that the court may advise the jury to disregard them; it is too late to raise the question for the first time on appeal. (Id.)
54. **OBTAINING MONEY BY FALSE PRETENSES—SALE OF MICA MINE—SUFFICIENCY OF INFORMATION.**—In a prosecution for obtaining money under false pretenses the information states facts sufficient to constitute a public offense where it alleges that the defendant together with another person, "devising and intending by unlawful ways and means and by false and fraudulent pretenses and representations to obtain and get into their custody and possession the personal property of Frank M. Ferguson, with intent to cheat and defraud said Frank M. Ferguson of the same, did then and there willfully, unlawfully, knowingly, designedly, falsely, fraudulently, and feloniously, pretend and represent to said Frank M. Ferguson that they, the said E. J. Eddards and George Gilbert, had sold to the Standard Oil Company, a corporation, a mica mine for a large sum of money, and that said large sum of money was then and there in the hands of and in the possession of one Asa V. Mendenhall, and that a portion of said large sum of money, to wit, the sum of \$15,000, in lawful money of the United States, in the hands and in the possession of said Asa V. Mendenhall, was to be paid by said Asa V. Mendenhall to one J. S. Lord; that said \$15,000 in lawful money of the United States was the share and interest of said J. S. Lord received from the sale of said mica mine to the Standard Oil Company, a corporation; that adjoining said mica mine there were other lands containing mica, and that they, the said E. J. Eddards and George Gilbert, had then and there a contract with said Asa V. Mendenhall whereby the said Asa V. Mendenhall would, for a consideration of ten per cent of the sale price, induce the Standard Oil Company, a corporation, to purchase from them, the said E. J. Eddards and George Gilbert, ten mica claims

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for the sum of \$550,000 in lawful money of the United States when they, the said E. J. Eddards and George Gilbert, would locate and properly stake off said ten mica claims and obtain deeds on the said mica claims," it being further alleged that each of said representations was false and fraudulent and known to be so by the defendant, and were made to induce the defrauded party to pay to defendant and his associate the sum of two hundred dollars, and that the defrauded party believed said representations to be true and acted thereupon. (People v. Eddards, 660.)

55. **SUFFICIENCY OF INFORMATION—MEANS OF FRAUD—WHEN OBJECTIONS WAIVED BY FAILURE TO DEMUR.**—In such a case the information is sufficient both in the respect that it follows the language of the statute, and also in that it sets forth with particularity the details and successive steps of the fraud; and an objection to it on the ground that there is no reference as to the means by which the alleged fraud was consummated is one which is aimed at mere uncertainty, which should have been taken advantage of by a special demurrer, and in the absence of such demurrer, the objection, if otherwise tenable, was waived. (Id.)
56. **INSUFFICIENCY OF SINGLE REPRESENTATION—WHEN REVERSAL NOT WARRANTED BY.**—In such a case, while one of the several representations averred to have been made by the defendant might, if standing alone, be regarded as insufficient to base a prosecution upon, this fact is not sufficient to warrant a reversal of the case, where the other representations are sufficient. (Id.)
57. **INSTRUCTIONS — REFUSAL OF INSTRUCTION NOT ERROR WHEN COVERED BY OTHERS.**—In such a case there is no error in refusing an instruction proffered by the defense, however correct in point of law, where it is sufficiently covered by other instructions given by the court. (Id.)
58. **EVIDENCE—ADMISSIBILITY OF CONVERSATIONS OF DEFENDANT WITH THIRD PARTY—TELEGRAM FROM DEFENDANT TO ASSOCIATE.**—In such a case there was no error in permitting the party, who, it was charged, the defendant represented held the purchase money for the mica mine, to testify in respect to conversations between himself and the defendant regarding dealings between them closely allied to the transaction with the complaining witness; such conversations being admissible, first, as part and proof of the very dealings between the defendant and the alleged victim, set forth in the information; and, second, as evidence of a similar transaction with the alleged holder of the purchase money tending to shed light upon the motive of the defendant in making his representations to the complaining witness; nor was the admission in evidence of a telegram for money sent by the codefendant, with appellant, to the wife of another party, who was one of the associates of appellant in the mica enterprise. (Id.)

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59. **SUFFICIENCY OF EVIDENCE**.—In such a case, where the evidence is conflicting upon practically every important issue of fact involved in the trial, the appellate court, under the well established rule, is prohibited from considering the sufficiency of the evidence to sustain the verdict. (Id.)
60. **INFAMOUS CRIME AGAINST NATURE—INSUFFICIENCY OF INDIOTMENT**. An indictment charging the defendant with “the infamous crime against nature, with and upon one Frank B. Love, by then and there having carnal knowledge of the body of said Frank B. Love,” fails to state facts constituting a public offense in that it does not allege that Frank B. Love was a male person. (People v. Allison, 746.)
61. **CARNAL KNOWLEDGE DEFINED**.—Carnal knowledge is synonymous with and means sexual intercourse. (Id.)
62. **NAME OF COMPLAINANT—SEX CANNOT BE PRESUMED FROM—JUDICIAL KNOWLEDGE**.—The name Frank is generally given to males, but it is sometimes given to females, and the court cannot take judicial knowledge of the sex of the party upon whom the crime is alleged to have been committed from the name alone. If the complainant was a female, which must be assumed, since the contrary does not appear, the defendant is merely charged with having sexual intercourse with a female which does not constitute a crime. (Id.)
63. **INDICTMENT CAPABLE OF TWO CONSTRUCTIONS—PRESUMPTION OF INNOCENCE**.—While an indictment will be held sufficient where the crime is substantially alleged in the words of the statute, or their equivalent, nevertheless, if the facts stated are capable of two constructions, upon one of which the facts might be true and not constitute a crime, then it is insufficient in charging the offense. The indictment cannot be aided by presumption, since all presumptions are in favor of innocence, and if the facts stated may or may not constitute a crime, the presumption is that no crime is charged. (Id.)
64. **JURORS—VOIR DIRE EXAMINATION—DISALLOWANCE OF QUESTIONS—HARMLESS ERROR**.—In a prosecution for selling intoxicating liquors in no-license territory error, if any, in disallowing questions to a juror on his *voir dire* examination is without prejudice to the defendant, if he exhausts but seven of the peremptory challenges to which he is entitled and the juror is accepted and constitutes one of the panel that tries the case. (People v. Perry, 837.)
65. **INTOXICATING LIQUORS—SALE IN NO-LICENSE TERRITORY—EVIDENCE OF OTHER SALES**.—In such prosecution error, if any, in admitting testimony of prior sales of liquor by the defendant, is cured if the court orders the evidence to be stricken out and instructs the jury to wholly disregard it, and other evidence produced by the people justifies the verdict of guilty. (Id.)

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66. **INFORMATION—ERROR IN ALLEGING PLACE OF SALE—AMENDMENT.**—If the information in such case charges that the offense was committed in no-license territory but mentions the wrong township, it is not error to permit the district attorney to amend the information in this respect at the trial. (Id.)
67. **PLACE OF SALE OF LIQUOR—NECESSITY OF PARTICULARLY DESCRIBING IN INFORMATION.**—It is the better practice, where infractions of the Local Option Law are charged, to describe the unit within which they have occurred by name or number, as the case may be, so as to particularly identify it, but where the information, merely following the language of the act, charges that the illicit sale was made in "no-license territory," that should be a sufficient statement of the offense to inform the defendant of the particular offense against which he is thus required to defend. (Id.)
68. **SALE OF ALCOHOLIC LIQUORS IN "NO-LICENSE" TERRITORY—JUDGMENT AFFIRMED.**—On this appeal from a judgment of conviction upon an information charging defendant with selling alcoholic liquors in "no-license" territory, there being no appearance by the defendant after the filing of the transcript of the phonographic report of the trial, the judgment is ordered affirmed. (*People v. Galli*, 633.)
69. **ATTEMPT TO COMMIT LARCENY—SUBSTITUTION OF BOGUS RING FOR GENUINE ONE IN SHOW CASE.**—Where one enters a jewelry store, asks to be shown a tray of diamond rings, and while looking at them attempts to substitute a bogus ring in place of a good one in the tray, but, being detected, abandons his purpose and seeks safety in flight, he may be convicted of grand larceny. (*People v. Gilmore*, 332.)
70. **ATTEMPT TO COMMIT LARCENY—SUBSTITUTION OF BOGUS FOR GENUINE RING.**—Where two men enter a jewelry store, ask to be shown some diamond rings, and while a sale is being negotiated the salesman discovers an imitation diamond ring has been put in the tray in place of a genuine one, and upon his demand that the ring be returned the would be purchasers run away, and afterward the good ring is found upon or under the rubber mat on the show case and a bogus ring is found on each of their persons, the evidence is sufficient to support a conviction of an attempt to commit larceny. (*People v. Isenberg*, 334.)
71. **CONFESSION—ADMISSIBILITY WHEN MADE TO POLICE OFFICER.**—If one of the men, after his arrest, makes a statement as to the commission of the offense to police officers in response to their interrogations, there being no coercion, improper importunities, or inducements, the confession is admissible against him. (Id.)
72. **INTERFERING WITH ELECTRICAL WIRES—ALLEGED MISCONDUCT OF DISTRICT ATTORNEY.**—In this prosecution for the crime defined by section 593 of the Penal Code, it is held that there is no merit in

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the claim that the district attorney was guilty of misconduct on the trial, and that while perhaps he should not have asked certain questions complained of, the record fairly shows that the questions complained of were invited by the previous questions of the counsel for defendant; and that whatever harm resulted from asking those questions was cured and condoned by the subsequent questions of defendant's counsel put to the defendant when a witness in his own behalf, which brought out very emphatically and distinctly the identical matter embraced in the questions complained of. (*People v. McAlpine*, 727.)

73. **EVIDENCE—WHEN ERROR CURED.**—It is the settled rule that error, if any, of the kind complained of is cured by the bringing out of the same subject matter by the defendant's counsel. (*Id.*)
74. **RIGHT OF CORPORATION TO DO BUSINESS—IDENTITY OF DEFENDANT—SUFFICIENCY OF EVIDENCE.**—It is further held that the proof abundantly established the fact that the complaining corporation was authorized to do business at its location at the time of the commission of the offense and that it was so doing business under proper and legal authority; and that the evidence was sufficient to establish the fact that defendant was the perpetrator of the offense and amply supports the verdict and judgment. (*Id.*)
75. **PLEADING—SUFFICIENCY OF INFORMATION.**—In a prosecution for attempt to commit grand larceny by trick and device the information is sufficient where it follows the language of the statute. (*People v. Vaughn*, 736.)
76. **ALLEGED MISCONDUCT OF DISTRICT ATTORNEY—WHEN NOT CONSIDERED ON APPEAL—FAILURE TO REQUEST ADMONITION TO JURY.**—In such a case the district attorney is entitled in his argument to the jury to make any deduction from the evidence and to draw any inference from the testimony that in his judgment is logical, even though his comment upon the conduct and character of the defendant may be harsh; and it is the general rule that even though misconduct of the district attorney be conceded, in the absence of a request to the court to admonish the jury to pay no heed to it, complaint of the same will not be heard in the appellate court. (*Id.*)
77. **ATTEMPT TO COMMIT GRAND LARCENY BY TRICK AND DEVICE—SUFFICIENCY OF EVIDENCE.**—Where, in such a case, if the transaction involved in the information and established in evidence at the trial had been completed to the extent of the defendant obtaining money from the complaining witness and retaining it for her own use, she would have been guilty of the crime of grand larceny by trick and device, the fact that she was prevented from the commission of the crime by any circumstances whatever does not alter the situation; and if upon the completion of the transaction she would have been guilty of the crime of grand larceny by trick and device, the evidence is sufficient to sustain the finding of the jury implied from their ver-

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dict that she was guilty of an attempt to commit grand larceny by the same means. (Id.)

78. **INFERENCES FROM EVIDENCE—INTENT—PROVINCE OF JURY.**—In such a case, while the inference might be drawn from the evidence that it was the intent of the defendant to get the money of the complaining witness under the pretense that she had some secret influence and would use it and the money to procure a dismissal of the criminal prosecution then pending against the son of the complaining witness, but on the other hand, it might be fairly inferred from all the evidence that her intent was to keep the money for herself rather than to resort to any such course, the question was one for the jury to determine and not for the appellate court; and there being evidence to sustain the theory of the people upon which the case was tried and defendant convicted, the verdict must stand as far as the appellate court is concerned. (Id.)
79. **PRONOUNCEMENT OF JUDGMENT—POSTPONEMENT AT DEFENDANT'S REQUEST—FINDING OF TRIAL COURT THEREON CONCLUSIVE.**—In such a case, the contention of the defendant that a new trial should have been had because the sentence of the trial court was postponed beyond the statutory time is answered by the minutes of the trial court, which were corrected at the request of the defendant, upon the hearing of which motion evidence was taken and the court after hearing conflicting evidence ordered the minutes to be corrected to show that the postponement of the pronouncement of judgment was had at the request of defendant. (Id.)
80. **EVIDENCE—INTENT—EXHIBITION OF NOTE TO WOMEN'S CLUB.**—There was no error in such a case in excluding testimony proffered for the purpose of showing that the defendant exhibited the promissory note obtained from the complaining witness to the president of a certain women's club before any trouble concerning the transaction arose, for the purpose of rebutting the inference resulting from other testimony in the case that the defendant obtained the note for her own benefit, defendant's contention being that the note was obtained for the benefit of the club, and to be used for legitimate purposes, but there being nothing in the proffered testimony to indicate that it was the purpose and intent of the defendant to transfer the note to the president of the club, in consideration of the influence of the club to be exercised on behalf of the son of the complaining witness; especially where the testimony of the defendant herself seems to negative such an intent. Such evidence is immaterial and irrelevant and to a certain extent self serving. (Id.)
81. **GRAND LARCENY—EVIDENCE—DEPOSITIONS—FOUNDATION FOR—DISCRETION OF COURT.**—In a prosecution for grand larceny the question as to whether due diligence was shown in an effort to procure the prosecuting witness, as a foundation for admission in evidence of his deposition taken upon the preliminary examination, is largely

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addressed to the discretion of the trial court; and where the people rely for such showing upon returns of the sheriffs of quite a number of counties of the state, including the county which was the last known place of residence of the desired witness, in which these officials each certified that after due search and diligent inquiry, they had been unable to find the witness, and it was further shown that a diligent search had been made for the witness in the county where the crime occurred and where the witness had been staying and had directed his letters sent, it cannot be said on appeal that the trial court abused its discretion in admitting the deposition in evidence. (*People v. Trent*, 740.)

82. **FAILURE TO PRESENT CERTIFICATE OF OFFICIAL REPORTER.—INSUFFICIENT OBJECTION TO EVIDENCE.**—In such a case there was no error in overruling the general objection to the deposition "that the proper foundation had not been laid" without directing the attention of the court or opposing counsel to the specific defect that the certificate of the official reporter of the magistrate upon the preliminary examination who took and transcribed such deposition was not presented or admitted in evidence; where the record further discloses that this general objection was made during the course of a discussion as to the sufficiency of the preliminary showing as to due diligence in seeking to locate the missing witness and did not refer directly to the defect in the omission to produce the reporter's certificate; especially where it appears that the certificate was in court at the time and could easily have been produced and offered if the specific objection had been made. (*Id.*)

83. **LEWD ACT ON THE BODY OF A CHILD—SUFFICIENCY OF INDICTMENT—SECTION 288, PENAL CODE.**—An indictment which charges that the defendant, on a certain date, and at a certain place, "did then and there willfully, unlawfully and feloniously commit a lewd and lascivious act upon and with the body, and certain parts thereof, of one Crystal Davidson, a female child under the age of fourteen years, to wit, of the age of eight years, by the said Anton Dabner then and there inserting and placing his hands up under the clothes and through and inside of the drawers of said Crystal Davidson, with intent then and there of arousing, appealing to and gratifying the lust, passion and sexual desires of him, the said Anton Dabner," sufficiently charges the crime defined by section 288 of the Penal Code. (*People v. Dabner*, 630.)

84. **CONSTRUCTION OF STATUTE.**—Section 288 of the Penal Code provides for the punishment of any lewd or lascivious act willfully and lewdly committed upon or with the body, or any member thereof, of a child with the intent of arousing or gratifying the lust or sexual desires of either the perpetrator or his victim, and it is not necessary to charge that the accused touched the naked body, or some part of the body, in fondling or manipulating the person of the child. ((*Id.*))

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- 85. LIBEL—LETTER CHARGING FORGERY—ADMISSION OF UNTRUTH—EVIDENCE OF GOOD MOTIVES AND JUSTIFIABLE ENDS—WHEN PROPERLY EXCLUDED—CONCLUSIVE PRESUMPTION OF MALICIOUS AND GUILTY INTENT—SECTION 1962 CODE CIVIL PROCEDURE.**—In a prosecution for libel, based upon a letter written by the defendant containing a charge of forgery against an attorney, where the defendant upon the trial not only made no effort to prove the truth of the assertion, but expressly admitted the charge of forgery was untrue, the trial court properly excluded from evidence documents including certain letters which passed between himself and the attorney while the latter was acting for defendant in certain litigation, which letters and documents defendant contended were admissible as tending to show his intention in uttering the libel, and as proving it was published with good motives and justifiable ends, as the defendant, in uttering the libel, engaged in the deliberate commission of an unlawful act for the purpose of injuring another from which, under section 1962 of the Code of Civil Procedure, a malicious and guilty intent is conclusively presumed. (*People v. Pryal*, 779.)
- 86. STATUTORY CONSTRUCTION—SECTIONS OF CODE TO BE CONSTRUED TOGETHER.**—It is a well known rule of construction that the various sections of the code are to be read together and harmonized if reasonably possible. (*Id.*)
- 87. CONSTRUCTION OF SECTIONS 250 AND 251 PENAL CODE, AND SECTION 1962 CODE CIVIL PROCEDURE—ADMITTED FALSE PUBLICATION—INNOCENT MOTIVE—PRESUMPTION OF MALICE—EVIDENCE.**—When sections 250 and 251 of the Penal Code are read together in the light of section 1962 of the Code of Civil Procedure, it is quite plain that proof of an innocent motive or intent in publishing a willful defamation, admittedly false, will not be permitted in the face of the conclusive presumption of malice which the latter section of the code creates, unless such proof shows such publication to be in the nature of a privileged communication. (*Id.*)
- 88. EVIDENCE—DIFFICULTY BETWEEN ATTORNEY AND CLIENT.**—In such a case, where the proffered evidence tended to show that difficulties had arisen between the defendant and the attorney, over the latter's conduct during certain legal proceedings, resulting in an effort on the part of the defendant to discharge his counsel, such evidence, instead of showing that the motive for publishing the willful defamation was an innocent one, would rather tend to strengthen the presumption that the publication was inspired by ill will and was malicious. (*Id.*)
- 89. LIBEL—RIGHT OF JURY TO DETERMINE LAW AND FACT—CONSTRUCTION OF ARTICLE I, SECTION 9 OF THE CONSTITUTION AND SECTION 251 PENAL CODE—POWER OF COURT TO RULE ON ADMISSIBILITY OF EVIDENCE NOT TAKEN AWAY.**—The provisions of article I, section 9 of the state constitution and of section 251 of the Penal Code that

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in the trial of a case of criminal libel "the jury shall have the right to determine the law and the fact" does not take away from the court the right to rule upon the admissibility of evidence during the trial. (Id.)

90. **INSTRUCTIONS—ALLEGED MISCONDUCT OF DISTRICT ATTORNEY AND JURY.**—In this prosecution for criminal libel it is held that there was no error in the instructions given by the court to the jury and that there was no misconduct on the part of either the district attorney or the jury. (Id.)
91. **HOMICIDE COMMITTED BY INMATE OF INSANE ASYLUM—SUBMISSION OF QUESTION OF INSANITY TO JURY.**—Where inmates of an insane asylum, who have not been cured or discharged, commit a homicide in attempting to escape, the court must, on motion made before their trial for murder, submit the question of their present insanity to a jury as provided by section 1368 of the Penal Code. (*People v. West*, 369.)
92. **INSANITY—COMPETENCY OF ACCUSED TO MAKE DEFENSE.**—The question thus presented to the court is different from that involved in the consideration of whether the defendants are responsible for the alleged homicide. As to their responsibility for the crime charged, the inquiry must be whether they knew the difference between right and wrong and could distinguish the quality and consequence of their act, but here the question is whether they are mentally competent to make a rational defense. (Id.)
93. **INSANITY OF ACCUSED—DISCRETION OF COURT IN SUBMITTING QUESTION TO JURY.**—There is no discretion left in the court, in the matter of submitting the question of the sanity of a defendant to a jury, when a doubt arises as to his sanity; and ordinarily if there are statements under oath of a credible person or persons that he is insane, such doubt is or should be raised and the question must be submitted to a jury. The only contingency is, Does doubt arise? (Id.)
94. **JURY TO TRY INSANITY—WHEN MUST BE IMPANELED.**—If information comes, from a proper source and through proper channels, that the defendant is insane, or if, through observation and personal inspection, the information is disclosed to the court, a jury must be impaneled to pass upon his mental condition. (Id.)
95. **RESPONSIBILITY FOR CRIME—ABILITY TO MAKE DEFENSE.**—A person may be sane enough to be responsible for a crime and yet incapable of making his defense, and, on the other hand, he may have mental capacity to be placed on trial and yet be insane within the contemplation of the law as to responsibility for a criminal act. (Id.)
96. **HOMICIDE—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.**—In this prosecution for homicide, although the evidence is technically sufficient to uphold the conviction of manslaughter, there exists grave

CRIMINAL LAW (Continued).

doubt of the guilt of the accused of any crime. (*People v. Hall*, 842.)

97. **ARGUMENT OF DISTRICT ATTORNEY—WHEN IMPROPER AND GROUND FOR REVERSAL.**—Where there is a manifest paucity of evidence tending to establish the guilt of the accused, as is here the case, it is reversible error for the district attorney to state in his argument that the jurors, if they acquit the defendant, will be afraid to go upon the streets and meet their fellow-men. (*Id.*)
98. **DUTY OF DISTRICT ATTORNEY—MAJESTY OF LAW—KEEPING WITHIN RECORD.**—A public prosecutor represents all the people, of whom every person accused of violating public law is none the less one because he is so accused. He represents the majesty of the law, which stands for the protection of every citizen against the taking of his life, his liberty, or his property without its due process—the law which condemns rather than commands the conviction of a person of a public offense upon insufficient evidence or by unfair means. That official should always do his sworn duty, of course, but he should always do it fairly and justly and not permit the great power with which he is clothed to be converted into an instrument of persecution. He should, as indeed any lawyer should, in his address to a jury, remain strictly within the record, and not attempt to evolve any theory or to import into the case any features not fairly and reasonably justified by the proofs. (*Id.*)
99. **MISCONDUCT OF DISTRICT ATTORNEY—REVIEW ON APPEAL.**—Alleged misconduct of a district attorney may be reviewed on an appeal from the judgment, notwithstanding the absence of any ruling of the trial court in reference thereto, if objection is made by the defendant and the trial court refuses to take any heed thereof, and exception is reserved and presented by a proper record on appeal. (*Id.*)
100. **HOMICIDE—CHANGE OF VENUE—ESSENTIALS OF AFFIDAVIT.**—The affidavit in support of an application for a change of venue in a homicide case, on the ground of local prejudice and bias of the judge, should not stop with stating conclusions; it must state facts, and the facts stated must be sufficient to convince a reasonable mind that the opinion of the affiant is well founded. (*People v. Ford*, 888.)
101. **AFFIDAVIT FOR CHANGE OF VENUE—WHEN INSUFFICIENT.**—An affidavit in a homicide case which merely alleges that friendly relations existed between the judge and the deceased, that the latter was a popular public officer, that the mind of the public is inflamed against the defendant, and that the person in relation to whose property and affairs the homicide occurred is a wealthy and widely known landowner, without setting forth more facts showing bias and prejudice calculated to interfere with a fair trial, is insufficient to sustain an application for a change of venue. (*Id.*)

CRIMINAL LAW (Continued).

- 102. HOMICIDE—INDICTMENT IN LANGUAGE OF STATUTE—PROOF OF CONSPIRACY.**—Where an indictment charges several persons with murder in the language of the statute, evidence is admissible to show a conspiracy between them, it appearing that the homicide was committed while they were engaged in the commission of an unlawful act. Proof of the conspiracy is not made to establish another and distinct crime—that is, conspiracy as such—but to show the circumstances under which the homicide was committed and that the acts were unlawful in the commission of which the killing resulted. (Id.)
- 103. CONSPIRACY RESULTING IN HOMICIDE—PRINCIPALS AND ACCESSORIES.** Where one person unites with one or more other persons in an enterprise to commit an unlawful act, whether a felony or misdemeanor, with the intention to withstand all opposition by force, and is present aiding and abetting the deed, and murder is committed by some one of the party in pursuance of the original design, or the unlawful act results in death, he is guilty as the principal or immediate offender. (Id.)
- 104. RESPONSIBILITY OF CONSPIRATORS—ACT NOT ORIGINALLY INTENDED.** In such case each conspirator is responsible criminally for the acts of the others, done in furtherance of the common design, although such acts were not intended as part of the original plan. (Id.)
- 105. RESISTING ARREST BY STRIKING LABOR LEADER—INCITING OTHERS TO ASSIST—HOMICIDE BY CONSPIRATORS.**—If it is shown in a prosecution for homicide that the defendant, as the leader of a large number of striking hop pickers, unlawfully resisted arrest, and, by inciting those under his leadership to assist him in such unlawful act, a homicide resulted through the act of one or more of them, the jury may properly be instructed that where several persons conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates, committed in furtherance of any prosecution of the common design for which they combine. (Id.)
- 106. LAWFULNESS OF STRIKE—REFUSAL TO INSTRUCT JURY REGARDING.**—In such prosecution the court properly refuses to instruct the jury on the lawfulness of striking, picketing, and boycotting, when the evidence does not show that the conspirators were engaged in such acts when the homicide occurred, although the officers who were killed might not have been present had it not been for a strike. (Id.)
- 107. FELONIES OR MISDEMEANORS—NO DISTINCTION BETWEEN CONSPIRACIES TO COMMIT.**—The law makes no distinction between conspiracies to commit misdemeanors and conspiracies to commit felonies, and a homicide perpetrated in furtherance of a conspiracy to commit a breach of the peace, or to resist an officer in the discharge of his

CRIMINAL LAW (Continued).

- official duty, is murder as well as a homicide committed in furtherance of a conspiracy to commit a felony. (Id.)
108. **HOMICIDE—IMPLIED MALICE—ABSENCE OF CONSIDERATION OF PROVOCATION.**—Any unlawful killing of a human being, with malice aforethought, express or implied, is murder. Malice is implied when no considerable provocation appears. (Id.)
109. **GUILT OF ACCUSED AS PRINCIPAL—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.**—In this prosecution of the leader of striking laborers for murder in resisting arrest, the jury is justified from the evidence in finding him guilty as a principal although he did not himself fire the fatal shot. (Id.)
110. **EVIDENCE—DISTINCTION BETWEEN CONFESSIONS AND ADMISSIONS.**—A distinction exists, in legal contemplation, between admissions and confessions; a confession in criminal law is the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the same. It is restricted to acknowledgment of guilt. (Id.)
111. **ADMISSIBILITY OF ADMISSION—TENDENCY TO ESTABLISH GUILT—PRELIMINARY PROOF.**—An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence, without preliminary proof, merely because it may, when considered with other facts, tend to establish guilt. (Id.)
112. **DECLARATIONS OF ACCUSED—EFFECT OF DURESS.**—Declarations of a person accused of crime, which are not confessions of guilt, cannot be objected to as obtained under duress. (Id.)
113. **CONFESSIONS—CAUTION IN ADMITTING—WEIGHT AS EVIDENCE.**—While confessions are to be received with caution, yet when the admission is deliberately made and precisely identified, the evidence it affords is of the most satisfactory nature. (Id.)
114. **CONFESSION—CORROBORATION—PROOFS OF CORPUS DELICTI.**—Where the *corpus delicti* is otherwise satisfactorily proved, a defendant may be convicted on his uncorroborated confession; proof of the *corpus delicti* may be considered as a circumstance sufficiently corroborating a confession. (Id.)
115. **DOCTRINE OF REASONABLE DOUBT—INSTRUCTION TO JURY.**—A suggestion to the jury, in giving an approved instruction upon the doctrine of reasonable doubt, that the term "reasonable doubt" is "probably pretty well understood but not easily defined," is unnecessary but harmless. (Id.)
116. **INSTRUCTION ON REASONABLE DOUBT—HARMLESS OMISSION.**—The omission to state, at the end of an instruction on the question of reasonable doubt, that the jury may not convict unless the evidence convinces them beyond a reasonable doubt, is not prejudicial error if this admonition occurs frequently in other instructions. (Id.)

CRIMINAL LAW (Continued).

117. **WITNESS FALSE IN PART—INSTRUCTIONS.**—An instruction to the jury that “you have a right to disregard entirely the testimony of any witness whom you believe to have willfully testified falsely,” is properly refused, as failing to use the necessary qualifying words “in a material matter,” especially if the court elsewhere instructs the jury that “a witness willfully false in one part of his testimony is to be distrusted in others.” (Id.)
118. **HOMICIDE.**—Judgment and order denying a new trial affirmed on the authority of *People v. Ford*, ante, p. 388. (*People v. Suhr*, 805.)
119. **APPEAL—ORDER DENYING NEW TRIAL—PRESUMPTION AS TO CORRECTNESS.**—On an appeal in a homicide case from an order refusing a new trial it will be presumed that the ruling was correct where neither the grounds upon which the motion was based nor the affidavits of newly-discovered evidence are incorporated in the record. (*People v. Vukojevich*, 459.)
120. **AFFIRMATIVE SHOWING OF ERROR—DUTY OF APPELLANT TO MAKE.**—It devolves upon an appellant to show the existence of error. In the absence of such showing the appellate court, in accordance with the rule that all intendments are in favor of the regularity of the proceedings, will indulge the presumption that the ruling of the trial court complained of was correct. (Id.)
121. **CONFLICT OF EVIDENCE—PROVINCE OF APPELLATE COURT.**—Appellate courts cannot and will not, where a substantial conflict of evidence exists, determine the credit which should be accorded witnesses, or attempt to weigh their testimony. (Id.)
122. **HOMICIDE—SUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION.**—In this prosecution for murder the evidence is sufficient to support the verdict of guilty, though no witness testified to actually seeing the defendant inflict the fatal wound. (Id.)
123. **DYING DECLARATION—SENSE OF IMPENDING DEATH.**—In such prosecution a declaration of the deceased to the effect that the defendant had killed him, made within one or two minutes before his death from the wound inflicted upon him, is admissible in evidence as having been made “under a sense of impending death.” (Id.)
124. **PROOF THAT DECLARATION WAS MADE UNDER SENSE OF IMPENDING DEATH.**—To constitute proof that a declaration was made under sense of impending death, it is not necessary that the deceased should have expressed in words the belief that he was about to die; it is enough if it satisfactorily appears in any mode that the declaration was made under that sanction. (Id.)
125. **OPINION OR CONCLUSION—WHETHER DECLARATION CONSTITUTES.**—A statement made by a wounded man immediately preceding dissolution, that the defendant killed him, is not the expression of an opinion or conclusion. (Id.)

CRIMINAL LAW (Continued).

126. **MISCONDUCT OF COURT TOWARD WITNESS—WHETHER PREJUDICIAL.** For a trial judge in a homicide case to tell a witness to "shut up," and to use no "more profane language or you will get in jail," is not reversible error. (Id.)
127. **COURTESY OF COURT TOWARD WITNESS—REVIEW ON APPEAL.**—The degree of courtesy to be exercised by the trial court toward a witness is not a subject for judicial review, unless it clearly appears that the defendant's rights were prejudiced thereby. (Id.)
128. **INSTRUCTIONS—REFUSAL TO GIVE—REVIEW ON APPEAL.**—Alleged error in refusing to give certain instructions to the jury cannot be considered on appeal, in the absence of anything in the record showing that the defendant requested the court to give any instructions. (Id.)
129. **MURDER—EVIDENCE—POSSESSION OF PISTOL—CROSS-EXAMINATION OF DEFENDANT—WHEN PROPER.**—In this prosecution for murder where the direct examination of the defendant unequivocally referred to the pistol with which it is alleged she committed the crime charged against her, and to her possession of it, prior to her going to a moving picture show, there was no error in allowing the people to cross-examine her as to what she did with the pistol prior to the shooting and where she carried it on her person, it appearing that the whole cross-examination on this point was germane to the direct examination. (People v. Lux, 726.)
130. **PANDERING—INFORMATION CHARGING CRIME IN LANGUAGE OF STATUTE.**—An information for pandering is sufficient if it charges the offense in the language of the statute, and states the place where it was committed. (People v. De Martini, 9.)
131. **PARTICULAR HOUSE OF PROSTITUTION—NECESSITY OF ALLEGING.**—It is unnecessary for the information to show the particular house of prostitution of which the woman was induced to become an inmate. (Id.)
132. **COMMISSION OF CRIME IN TWO COUNTIES—VARIANCE BETWEEN INFORMATION AND EVIDENCE.**—If the information alleges the commission of the crime in one county, while the evidence shows that the crime was committed partly in that county and partly in another, there is no fatal variance. (Id.)
133. **CHARACTER OF HOUSE—PROOF BY REPUTATION.**—In a prosecution for pandering the character of the house involved may be proved by reputation, under the general rule that the character of a house of prostitution may be established by evidence of its reputation as such. (Id.)
134. **AMENDMENT OF SECTION 315 OF PENAL CODE—EFFECT ON ADMISSIBILITY OF EVIDENCE OF REPUTATION OF HOUSE.**—The amendment of 1905 to section 315 of the Penal Code, to the effect that in all prosecutions for keeping houses of prostitution "common repute may

CRIMINAL LAW (Continued).

be received of the character of the house" and the "purpose for which it is kept and used," does not exclude such evidence in other cases. (Id.)

135. **PIMPING—LACK OF ERROR.**—On this appeal it is held that the defendant was properly charged with the offense of "pimping," and that the evidence was sufficient, and that no prejudicial error was committed. (*People v. Mandal*, 629.)
136. **ORDER GRANTING NEW TRIAL—APPEAL—OPINION OF TRIAL COURT AS PART OF RECORD.**—Upon an appeal from an order granting a new trial in a criminal prosecution the opinion of the trial court, rendered at the time of the granting of the motion, which sets forth the reasons impelling the conclusion of the court that the verdict was not justified or sustained by the evidence, is no part of the record and cannot be considered in determining the propriety of the order. (*People v. Petros*, 236.)
137. **PANDERING—ATTEMPT TO COMMIT—CONFLICT IN EVIDENCE.**—In this prosecution for pandering there appears a conflict in the evidence upon the vital question whether the defendant committed any overt act in furtherance of what seems to have been a well-established intention in him to commit the crime charged, and hence the appellate court is required to affirm the order of the trial court granting a new trial on the ground of the insufficiency of the evidence to sustain the verdict of conviction. (Id.)
138. **NEW TRIAL—CONFLICTING EVIDENCE—DISCRETION OF TRIAL COURT.** The granting or denying of a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon an appellate court, unless it appears that there has been an abuse of discretion. The action of the trial court, in such a case, is so far a matter within its discretion that its decision, if there is any appreciable conflict in the evidence, is not open to review. (Id.)
139. **MOTION FOR NEW TRIAL—AUTHORITY OF TRIAL COURT—PROBATIVE VALUE OF TESTIMONY.**—While a trial court will not be allowed to trespass upon the functions of the jury, it is nevertheless invested with a supervisory control over a trial before a jury and is legally authorized to grant a new trial where it entertains a well-founded opinion, or one which appears to be sufficiently well-founded to preclude a reviewing court from declaring it not to be, that the result reached by the jury is not justified by the evidence. And, in determining this question upon a motion for a new trial, the trial court may pass upon the probative value of the testimony submitted in proof of the charge against the accused. (Id.)
140. **PANDERING—ATTEMPT TO COMMIT—WHAT CONSTITUTES.**—Where a man represents to a woman that he will procure her a position if she will accompany him to a certain city, and thereupon he takes

CRIMINAL LAW (Continued).

her to a hotel in such city, where they occupy apartments as husband and wife, and in a few days he turns her over to a prostitute to be put in a house of prostitution, he is guilty of an attempt to commit pandering, notwithstanding he does not personally procure for her a room or house in which to carry on prostitution, and the prostitute, to whom he intrusts her, intends to and does deliver her from him and places her in charge of the authorities for her protection. (Id.)

141. **WHEN ATTEMPT AT CRIME IS COMPLETED—INTERVENTION OF CIRCUMSTANCES PREVENTING CONSUMMATION OF OFFENSE.**—Under the language of the statute defining pandering, where it is made to appear that the inducement, persuasion, or encouragement, practiced by the accused, has reached the point that its effect would be to cause the female to become an inmate of a house of prostitution but for the intervention of circumstances apart from and independent of his will, the crime of an attempt to commit pandering is accomplished. (Id.)
142. **ATTEMPT TO COMMIT CRIME—WHAT CONSTITUTES.**—An attempt to commit a crime consists of an intent to commit it, and a direct ineffectual act done toward its commission. To constitute the crime of an attempt to commit a crime, the acts of the defendant must go so far that they will result in the accomplishment of the crime unless frustrated by extraneous circumstances. (Id.)
143. **RAPE—FEMALE UNDER AGE OF CONSENT—EVIDENCE OF SUBSEQUENT ACTS OF INTERCOURSE.**—In a prosecution for rape upon a female under the age of consent evidence is admissible not only to prove the act of intercourse charged, but subsequent acts, though committed after she reached the age of consent. (People v. Parrish, 314.)
144. **INTERCOURSE WITH OTHERS—FIRST ACT BY DEFENDANT—HARMLESS ERROR IN ADMISSION OF EVIDENCE.**—It is immaterial in such case whether the defendant or some other person first had intercourse with the prosecutrix, and hence she should not be allowed, over objection, to testify that the act charged in the indictment was the first act of intercourse, but error in admitting such testimony is not prejudicial in the presence of other evidence tending strongly to show the defendant's guilt. (Id.)
145. **MARITAL RELATIONS BETWEEN DEFENDANT AND HIS WIFE—EVIDENCE TO SHOW THEIR CONTINUANCE.**—It is not prejudicial error to refuse to allow the defendant to elicit from the prosecutrix on cross-examination that the relations of the defendant and his wife were friendly, in order to show the improbability of the story of the prosecutrix that the defendant had daily intercourse with her for a year while his relations with his wife were unaffected, if he is permitted to show by his wife that his cohabitation with her was uninterrupted during such period. (Id.)

CRIMINAL LAW (Continued).

146. **CONDUCT OF DEFENDANT TOWARD PROSECUTRIX—ADMISSION OF TESTIMONY IN REBUTTAL.**—Testimony as to the conduct of the defendant at different times toward the prosecutrix, offered in rebuttal instead of in chief, is not prejudicial if his conduct is otherwise shown. (Id.)
147. **CORROBORATION OF PROSECUTRIX—WHETHER NECESSARY.**—In a prosecution for rape upon a female under the age of consent, corroboration of the prosecutrix is unnecessary. (Id.)
148. **IMPROBABLE TESTIMONY—WEIGHT A QUESTION FOR JURY.**—A witness may testify in such prosecution that on one occasion the defendant had intercourse with the prosecutrix in the plain view of the witness, the weight of such testimony being for the jury. (Id.)
149. **MISCONDUCT OF DISTRICT ATTORNEY—REFERENCE TO IMPROPER MATTER.**—In such prosecution it is misconduct, but not such as to require a reversal of the judgment of conviction, for the district attorney, in his argument to the jury, to remind them of a fact which the court in effect has previously told them they must not consider, and thereby seek to influence them by an unworthy appeal to class prejudice. (Id.)
150. **EVIDENCE OF SUBSEQUENT ACTS OF INTERCOURSE—PURPOSE OF ADMITTING—INSTRUCTIONS.**—A charge to the jury that "you are further instructed, that evidence of subsequent acts of sexual intercourse between the defendant and the prosecutrix, and of improper familiarity on the part of the defendant toward and with the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence solely to prove the disposition of the defendant herein toward G. and as having a tendency to render it more probable that the act of sexual intercourse charged in the information (indictment) was committed by the defendant on the person of said G., and is to be considered by the jury for that purpose only and for no other," is not so prejudicial as to warrant a reversal of the judgment. (Id.)
151. **CHARGING RAPE UPON FEMALE UNDER AGE OF CONSENT—CONVICTION OF ASSAULT TO COMMIT RAPE.**—A verdict of guilty of an assault with intent to commit rape is without the scope of an information charging an act of sexual intercourse with a female under the age of consent. (People v. Akens, 373.)
152. **ATTEMPT TO COMMIT RAPE—FEMALE UNDER AGE OF CONSENT.**—In a prosecution under such information it is error to instruct the jury that if the defendant attempted to rape the prosecutrix but failed in accomplishing his purpose, he may be found guilty of an assault with intent to commit rape. (Id.)
153. **ASSAULT TO COMMIT CRIME—ATTEMPT TO COMMIT CRIME.**—An "assault" with intent to commit crime necessarily embraces an "attempt" to commit the crime, but the "attempt" does not necessarily include an "assault." (Id.)

CRIMINAL LAW (Continued).

154. **EXAMINATION OF DEFENDANT BY PHYSICIAN.**—In a prosecution for rape the defendant cannot be required to submit to an examination by a physician. (Id.)
155. **VIEW OF PREMISES—JURY TO BE ACCOMPANIED BY JUDGE AND DEFENDANT.**—If in such prosecution the jury should be sent to view the premises where the crime was committed, they should be accompanied by the judge and by the defendant if he desires to go. (Id.)
156. **CHARGE OF STATUTORY RAPE—CONVICTION OF ATTEMPT TO COMMIT—SUFFICIENCY OF EVIDENCE.**—In this prosecution for statutory rape, alleged to have been committed upon a child of eleven years of age by one who was aided and abetted by defendant, it is held that the evidence was sufficient to sustain a verdict finding the defendant guilty of an attempt to commit the crime charged. (People v. Horn, 583.)
157. **EVIDENCE—TESTIMONY OF PROSECUTRIX AND YOUNG BROTHER—DISCREPANCIES IN—CREDIBILITY OF FOR JURY TO DETERMINE.**—In such a case, although the testimony of the prosecutrix and her brother (who was younger than she), contained some discrepancies, it was a matter entirely within the legal competency of the jury to determine whether, notwithstanding such discrepancies, the testimony of those witnesses was, in the main, entitled to credit and sufficient to generate a conviction, beyond a reasonable doubt, of the guilt of the defendant. (Id.)
158. **TIME OF COMMISSION OF CRIME—PLEADING AND PROOF—VARIANCE—WHEN IMMATERIAL.**—In such a case, it was proper to allow evidence disclosing that the crime was committed on another day than that fixed in the information, where only one act of intercourse was claimed to have been committed in the case. (Id.)
159. **EVIDENCE—DIFFERENT ACTS OF SEXUAL INTERCOURSE—WHEN PEOPLE SHOULD ELECT.**—While the prosecution on a charge of rape may show that the crime described in the information was committed on some other day than that specially named or the day in near proximity to which the criminal act occurred, where it is claimed that several different felonious acts of sexual intercourse have taken place on as many different days between the defendant and the prosecutrix, it is the duty of the people, in the prosecution of the defendant, to select some particular time at which such act was committed and address their proof to the establishment of the crime at such time. (Id.)
160. **INSTRUCTIONS—SUFFICIENCY OF ENTIRE CHARGE.**—It is held in this prosecution for rape that from an examination of the entire charge it appears that the jury were fully and correctly instructed upon all the principles of the law pertinent to the charge set forth in the information. (Id.)

CRIMINAL LAW (Continued).

161. **LACK OF COMPLAINT OF ASSAULT BY PROSECUTRIX—INSTRUCTION AS TO PROPERLY REFUSED.**—In a prosecution for rape it was proper for the court to reject an instruction offered, by the defendant, which, if given, would have impressed upon the jury the importance of the absence of proof that the prosecutrix made complaint of the assault immediately after it occurred, as such an instruction would tend to create the impression that a conviction of the crime of rape could not be legally justified where there was no proof of immediate discovery to some third party by the prosecutrix of the fact of the assault upon her person, which is not required by the law. (Id.)
162. **EVIDENCE—CORROBORATION OF PROSECUTRIX UNNECESSARY—IMMEDIATE COMPLAINT OF ASSAULT ADMISSIBLE AS CORROBORATION.**—The fact that the prosecutrix in a case of rape made complaint of the assault to a third person immediately after it took place may be shown for the purpose only of corroborating her testimony of the assault; the allowance of such testimony for that purpose is an exception to the general rule against the proof of self-serving declaration, but, although such proof is allowable as corroboration, the law does not require the prosecutrix to be corroborated in order to sustain a conviction. (Id.)
163. **INSTRUCTIONS—REFUSING TO CALL JURY'S ATTENTION TO PARTICULAR EVIDENCE PROPER—EXAMINATION OF PROSECUTRIX BY DOCTORS.**—There was no error in such a case in refusing to charge the jury, at defendant's request, in substance, that it was the jury's duty to consider, in connection with the absence of proof that the prosecutrix complained to others of her treatment by the defendant immediately following the assault, the testimony of the doctors who professionally examined the sexual organs of the prosecutrix for the purpose of determining whether there existed therein conditions indicating that she had been subjected to acts of sexual intercourse, where the court instructed the jury that it was their duty to consider all the admitted evidence and to be governed entirely by that evidence in solving the question of the defendant's guilt or innocence. Such an instruction is also open to the objection that it calls the jury's attention to particular evidence or the want of evidence on some particular point, which is a practice not commendable. (Id.)
164. **INSTRUCTION TO SCAN TESTIMONY OF PROSECUTRIX FOR DESIGN PROPERLY REFUSED.**—In such a case, there was no error in refusing an instruction offered by defendant which was not only argumentative but would have instructed the jury that it was their duty to "scan the testimony of the prosecuting witness carefully to ascertain if she would be likely to have a design to warp her testimony to the prejudice of the defendant," and that they were at liberty to disregard her testimony, where the court fully, clearly, and correctly instructed the jury upon the general subject as to their duty and

CRIMINAL LAW (Continued).

- right in the matter of disposing of the testimony of the prosecutrix. (Id.)
165. **ARGUMENTATIVE INSTRUCTIONS IMPROPER.**—Argumentative instructions to a jury are not permissible and should never be given. (Id.)
166. **INSTRUCTIONS—WHEN CONVICTION OF ATTEMPT ALLOWABLE.**—In a prosecution for rape, there was no error in giving an instruction to the effect that, under the evidence, the jury were authorized to find the defendant guilty of an attempt to commit rape, where there was evidence from which the jury could have concluded that, rather than the crime itself, the accused had been guilty of an attempt to commit it. (Id.)
167. **CONVICTION OF ATTEMPT—CONSTRUCTION OF SECTION 663, PENAL CODE.**—Under section 663 of the Penal Code, a person prosecuted for an attempt to commit a crime, may be convicted thereof, although the evidence may show that the crime intended or attempted was perpetrated by the accused in pursuance of such attempt, “unless the court, in its discretion, discharges the jury and directs such person to be tried” for the crime itself; and there is no sound reason for holding that the principle stated in this section should not be as applicable to a case where the charge is of the crime itself and a conviction of an attempt to commit it sustainable. (Id.)
168. **MOTION FOR NEW TRIAL—MISCONDUCT OF JUROR—CONFLICTING EVIDENCE—FINDING CONCLUSIVE ON APPEAL.**—In a prosecution for rape, where the evidence is conflicting on a charge made on a motion for a new trial, that one of the jurors, while the trial was in progress, during adjournments, had referred to the case in conversation with a certain person and on another occasion discussed with or expressed to another party his conception of the merits of the case and declared his intention of voting for a verdict of conviction, a finding of the trial court in favor of the people upon the question is binding upon the court on appeal. (Id.)
169. **RAPE—INSUFFICIENT RECORD—LACK OF ERROR.**—On this appeal from a judgment of conviction of the crime of rape, it is held that no error appears from the fragmentary record, which consists merely of the minute entries of the trial kept by the clerk and the judgment of conviction. (People v. Taggart, 628.)
170. **RAPE—CRIME AGAINST FEMALE UNDER AGE OF CONSENT—VERDICT JUSTIFIED.**—In this prosecution for rape, alleged to have been committed upon a female under the age of eighteen years, it is held that, from a careful examination of the testimony, the instructions and the rulings of the court on questions involving the admissibility and nonadmissibility of certain testimony, it appears that the defendant was in all respects given a fair and legal trial and that the verdict was justified. (People v. Drennan, 645.)

CRIMINAL LAW (Continued).

171. **LACK OF CONSENT OF PROSECUTRIX—CONVICTION OF ASSAULT WITH INTENT TO COMMIT RAPE—SUFFICIENCY OF EVIDENCE.**—In such a case, where, although the prosecutrix was but a little over eight years of age, she protested against the conduct of the defendant which formed the basis of the charge in the information, from such testimony the jury were justified in finding that the defendant's acts were against the consent of the prosecutrix, and such finding, together with a finding that the defendant actually attempted to have sexual intercourse with the child, if, indeed, he did not succeed in doing so, is a sufficient predicate of the conclusion reached by the jury that the crime committed by the accused was that of an assault with intent to commit rape. (Id.)
172. **RAPE—CRIME AGAINST FEMALE UNDER THE AGE OF CONSENT.**—On an appeal from a judgment of conviction and from an order denying a new trial in a prosecution for rape alleged to have been committed upon a female under the age of consent, where there has been no record of the testimony or any briefs filed in the appellate court, and no appearance on behalf of the defendant when the cause was regularly called on the calendar, the court is justified in ordering the appeals dismissed. (*People v. Creitser*, 647.)
173. **LACK OF ERROR.**—It is held in this case that, from a careful examination of the record, nothing therein can be discovered which would warrant sustaining any of the appeals. (Id.)
174. **PRONOUNCEMENT OF JUDGMENT—WHEN WITHIN TIME.**—In this case the trial was called on November 12, 1913, and the same was then proceeded with, but before completing the jury panel the defendant withdrew his plea of not guilty theretofore interposed and entered a plea of guilty to the charge alleged in the information, and the court thereupon fixed November 15, 1913, as the time for pronouncing the judgment of sentence; thereafter the court continued the matter of sentencing the defendant from time to time until the period elapsing between the day upon which he pleaded guilty and the day upon which sentence was finally pronounced comprehended over one hundred days; subsequently the defendant withdrew his plea of guilty and asked that his case be set down for trial; the matter of fixing a date for the trial was continued until February 24, 1914, at which time the defendant again entered a plea of guilty to the information, and declared to the court that he desired to dispense with any further services of his attorney, and waived time for the passing of sentence, whereupon the court immediately pronounced judgment. *Held*, that while the court in the first instance exceeded its authority by postponing the matter of passing sentence beyond the time limited by section 1191 of the Penal Code, that point cannot be urged by the defendant in view of his subsequent withdrawal of

CRIMINAL LAW (Continued).

his plea of guilty and second entry of such plea and waiver of time for pronouncing judgment. *Id.*)

175. **RAPE—SUFFICIENCY OF EVIDENCE.**—In this prosecution for rape it is held that upon the whole case the evidence does not appear to be inherently incredible and improbable and that it is sufficient to support the verdict. (*People v. West*, 735.)
176. **RESISTING AN OFFICER—TAKING POSSESSION OF ATTACHED GOODS.**—An indictment charging that the defendant did “willfully, unlawfully, and knowingly resist, delay, and obstruct a public officer named C, who was” a constable of a certain township, engaged in executing a writ of attachment issued out of a designated justice’s court in a specified case, under which he was in possession of certain ties; and that the defendant, “by force and violence and against the will of said officer did take a portion of the said ties” from his possession, sufficiently charges the offense of resisting an officer as defined and condemned by section 69 of the Penal Code. (*Manss v. Superior Court of Mendocino County*, 533.)
177. **JURISDICTION OF SUPERIOR COURT TO TRY OFFENSE.**—Such charge is not within section 102 of the Penal Code, which makes it a misdemeanor to retake goods from the custody of an officer, and the superior court has jurisdiction to try it. (*Id.*)
178. **SECTIONS 69 AND 102 OF PENAL CODE—DISTINCTION.**—Section 102 of the Penal Code refers to interference with an officer where no force or violence is employed. Neither the term force nor violence is used in that section, while in section 69 an essential element is a “threat” or “force” or “violence.” (*Id.*)
179. **ROBBERY—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.**—In this prosecution for robbery the evidence is sufficient to support the verdict of guilty. (*People v. Svendsen*, 1.)
180. **RESTRICTION BY COURT OF CROSS-EXAMINATION—WHETHER PREJUDICIAL TO DEFENDANT.**—In such prosecution the trial court might properly have allowed the defendant greater latitude in the cross-examination of the prosecuting witness than it did, but it cannot be said that the record discloses that the defendant’s rights were prejudiced by the limitation placed on such cross-examination. (*Id.*)
181. **CROSS-EXAMINATION OF WITNESS—CONTROL BY COURT—REVIEW ON APPEAL.**—The control of the cross-examination of a witness, and the permitting of leading questions to be asked of one’s own witness, is largely in the discretion of the trial judge, and unless there is an abuse in the exercise thereof and the rights of the defendant are prejudiced thereby, the action of the lower court should not be disturbed on appeal. (*Id.*)
182. **CROSS-EXAMINATION OF ACCUSED—EXTENT TO WHICH SHOULD BE PERMITTED.**—Where the life or liberty of one accused of an offense

CRIMINAL LAW (Continued).

depends upon the uncorroborated evidence of the prosecuting witness, the ends of justice will be best subserved by permitting the light of a full investigation to be thrown upon the transaction, which, other than his own statement, in the absence of the direct evidence elicited by the district attorney, can be done only on cross-examination of the witness. The policy often pursued by district attorneys in proving the bare facts and then objecting to questions calculated to illuminate the subject involved, asked by the accused, upon the ground that they are not proper cross-examination, is not to be commended; and the trial judge, who is supposed as between the accuser and the accused to sit impartially, should, notwithstanding the limited scope of the direct examination, grant to the defendant the fullest opportunity for cross-examination and inquiry as to direct statements made against him by his prosecutor. (Id.)

183. **PROCEDURE IN CRIMINAL CASE—DUTY OF TRIAL COURT TO SEE THAT DEFENDANT IS ACCORDED EVERY RIGHT.**—So long as the present system of criminal procedure prevails, and particularly since the adoption of section 4½ of article VI of the constitution, under which, notwithstanding a defendant has by a ruling of the court been deprived of a legal right in his trial, he is nevertheless, on appeal, without remedy, unless the appellate court can say upon the entire evidence that such error has resulted in a miscarriage of justice, a greater and larger responsibility rests upon the trial judge in seeing that a defendant on trial is accorded every right to which he is entitled; otherwise a legal wrong is done under judicial sanction for which the aggrieved is without remedy. (Id.)
184. **ADMISSIONS OF DEFENDANT—ADMISSIBILITY IN EVIDENCE.**—Admissions made by the defendant to the arresting officer, which are not confessions of guilt, are admissible in evidence without any preliminary foundation being laid. (Id.)
185. **INSTRUCTIONS AS TO REASONABLE DOUBT—MODIFICATION—WHETHER ERROR.**—The modification of an instruction that, if after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is his duty "not to vote for a verdict of 'guilty' nor" not to be influenced into voting for the single reason that a majority of the jury should be in favor of a verdict of guilty, by striking out the quoted words, is not error. (Id.)
186. **MISCONDUCT OF COURT TOWARD DEFENDANT'S COUNSEL—WHETHER PREJUDICIAL ERROR.**—While the trial court in this case might have expressed its rulings in a manner indicative of less impatience and less calculated to affect the sensibilities of the defendant's counsel, it cannot be said, in the absence of prejudicial error, that this alone was sufficient to prejudice the rights of defendant. Such action

CRIMINAL LAW (Continued).

on the part of the court merely accentuates prejudicial error exhibited by the record. (Id.)

187. **ROBBERY—SUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION.**—In this prosecution for robbery the testimony of the prosecuting witness, if believed by the jury, warranted their return of a verdict of guilty, and the appellate court cannot say that credit should not have been given such testimony and hence it is bound thereby. (*People v. Osaki*, 329.)

See Extradition.

CUSTOM. See Lease, 6, 7, 11.

DAMAGES.

1. **BREACH OF CONTRACT TO SUPPLY WATER FOR IRRIGATION—LOSS OF CROP—SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS.**—In this action to recover damages for breach of contract by the vendor of land to furnish the vendee water for irrigation, resulting in the loss of the latter's potato crop, the findings as to the preparation of the land for planting, as to the time when it was ready to receive water, as to the arrest of the growth of the potatoes by reason of the lack of water, and that when water finally was furnished it was too late to save the crop, are supported by the evidence. (*Allen v. Los Molinos Land Company*, 206.)
2. **MEASURE OF DAMAGES—VALUE OF CROP LESS COST OF GROWING AND MARKETING.**—The correct measure of damages in such case is the market value of the potatoes at the selling place, less the expenses incurred in growing and marketing the crop; under the rule of section 3300 of the Civil Code that where an action is for the breach of an obligation arising from contract, the measure of damages "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the the ordinary course of things would be likely to result therefrom." (Id.)
3. **FINDINGS AS TO DAMAGES—INTERPRETATION—WHETHER SUPPORT JUDGMENT.**—A finding by the court in such case that the cost of producing and marketing the crop "would have been the sum of \$129.00, and that the net damage accruing to the plaintiff, to wit, the value of the crop that would have been produced less the said sum of \$129.00 was as great as \$700.00," is not a finding that the value of the crop was seven hundred dollars, but that its value was a sum equal to at least seven hundred dollars, after deducting \$129.00, and it supports the judgment for seven hundred dollars. (Id.)
4. **EVIDENCE TO SHOW THAT FURNISHING OF WATER WAS INDUCEMENT TO CONTRACT.**—It is not error to admit testimony in such action

DAMAGES (Continued).

that the agreement that water was to be furnished for irrigation was an inducement to purchase the land. (Id.)

See Eminent Domain; False Imprisonment, 3, 4; Fraud, 1-4; Lease, 8; Sale, 19; Unlawful Detainer, 2.

DEBTOR AND CREDITOR. See Account Stated; Assignment; Attachment; Fraud, 9, 10.

DECEIT. See Fraud.

DEDICATION.

1. **DEDICATION OF LAND FOR HIGHWAY—WHAT CONSTITUTES—PLATTING OF LAND AND RECORDING OF MAP.**—The survey, platting, marking, and mapping of lands, delineating a strip through them for purposes of a highway, and the filing of the map with the county recorder, constitutes an offer of dedication of the roadway delineated on the map as a public highway. (People v. Laugenour, 44.)
2. **DEDICATION BY VENDEE—RATIFICATION BY VENDOR.**—The fact that the platting and the recording of the map were done by the person who held a contract for the purchase of the lands, instead of by the owners thereof, is not material, if the owners thereafter make conveyances by reference to the map and the highway outlined thereon. (Id.)
3. **OFFER AND ACCEPTANCE OF DEDICATION—MANNER OF MANIFESTATION.**—The offer of the owner of land to dedicate a highway, and the acceptance of the offer by the public, may be manifested in many different ways. (Id.)
4. **CONSUMMATION OF DEDICATION—WHEN ACCOMPLISHED.**—If a binding offer to dedicate land for a highway has been made by the owners, and before revocation thereof an acceptance by the public is manifested, either by a formal act of the authorities, or by habitual user by the public a sufficient length of time clearly to show that the way has been thus recognized, used, and accepted as a public highway, the dedication is fully consummated. (Id.)
5. **CONSTRUCTIVE DEDICATION—SALE OF LOTS WITH REFERENCE TO MAP.**—Where the owner of land has platted it, laid out streets or roadways, and has sold the land by reference to such plat, or where he has a map or plat made, and, selling the smaller subdivisions, has described them as bounded by a road laid out through the larger tract, a constructive dedication arises. (Id.)
6. **COMMON-LAW DEDICATION—ESTOPPEL AGAINST OWNER.**—Independently of statute, the use of a street by the public for a reasonable length of time, where the intention of the owner to dedicate is clearly shown, is sufficient, without any specific action by the municipal authorities, either by resolution or by repairs or improve-

DEDICATION (Continued).

menta. A common-law dedication operates against the dedicator by estoppel, and this estoppel may be invoked by or on behalf of the public at large as well as by the municipal authorities of the city. (Id.)

7. **IMPLIED OR CONSTRUCTIVE DEDICATION—FACTS AND CIRCUMSTANCES SHOWING.**—Where the owners of a tract of land caused it to be surveyed and subdivided into smaller tracts with a roadway running through the larger tract upon which the smaller subdivisions abut, recorded the map, made sales of many of such smaller tracts according to the plat, and the purchasers thereafter, for at least twenty years, continuously use the roadway without objection, a dedication is thereby established, notwithstanding no express acceptance was attempted by the county authorities until about eighteen years after the recordation of the map, and the county never worked the road or otherwise recognized it as a public highway, and at the time of the filing of the map both ends of the roadway were inclosed, and a portion of the roadway was cultivated and used for pasturage by purchasers of the tracts. (Id.)
8. **WIDTH OF HIGHWAY—WHETHER TRAVELED WAY IS CONCLUSIVE THEREOF.**—Where there is a finding or indisputable evidence that a roadway dedicated to the use of the public is, as so dedicated, of a certain width, the fact that the main travel has customarily been confined to narrower limits than the width of the road as marked out and dedicated is not conclusive of the width of the road. (Id.)

See Easement, 1.

DEED.

1. **FIDUCIARY RELATIONS OF PARTIES—ACTION TO SET ASIDE.**—In this action to set aside a deed, executed by a woman to her physician in consideration of his promise to make certain payments of money and to care for her during the remainder of her life, the findings of the court in favor of the defendant on the issues of lack of mental capacity, want of consideration, and undue influence are supported by the evidence. (*Silveria v. Alexander*, 506.)
2. **ADEQUACY OF CONSIDERATION—WHETHER MATERIAL.**—While the benefits received by the grantor as a result of such contract were small in comparison with the value of the property conveyed, this is not a sufficient ground for setting aside the conveyance. In the absence of fraud, the amount of the consideration for the deed is immaterial. (Id.)
3. **SUPPORT OF GRANTOR—WHETHER SUFFICIENT CONSIDERATION FOR DEED.**—A deed executed in consideration of the grantee's promise to furnish support to the grantor for life is based upon an adequate consideration. (Id.)

See Easement; Quieting Title, 4-7.

DEMURRER. See Appeal, 11, 12.

DISTRICT COURT OF APPEAL. See Habeas Corpus.

DIVIDENDS. See Corporation, 10-12.

DIVORCE.

1. **SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS IN FAVOR OF DEFENDANT.**—In this action for a divorce the testimony of the defendant alone, if believed by the court, was sufficient to support the finding that she had not been guilty of the extreme cruelty charged against her. On the other hand, her testimony, with the corroborating testimony of other witnesses, was, if believed by the trial court, sufficient to support the finding that the plaintiff had been guilty of extreme cruelty toward her. The latter finding alone is in turn sufficient to sustain the judgment in favor of the defendant upon her cross-complaint. (*Baucom v. Baucom*, 108.)
2. **CONFLICTING TESTIMONY—REVIEW ON APPEAL.**—The decision of the trial court in such case, resting upon conflicting evidence, will not be disturbed on appeal. (*Id.*)
3. **AGREEMENT ADJUSTING PROPERTY RIGHTS—VALIDITY WHEN EXECUTED DURING TRIAL.**—An agreement by the parties to an action for divorce, made during the trial, that the case be submitted on the evidence then in, and that the husband abandon to the wife real estate standing in her name but claimed by him to be community property, upon her executing to him a mortgage on the property, is valid, and the mortgage becomes a proper subject of foreclosure upon default in payment. (*Stoff v. Erken*, 528.)
4. **CONSIDERATION FOR CONTRACT—WITHDRAWAL OF DEFENSE TO DIVORCE.**—The rule that where an agreement between husband and wife is founded upon a consideration to withdraw or abandon a defense to a suit for divorce, or to do anything to facilitate procuring the same, it is illegal and void, is not applicable to such case. (*Id.*)

EASEMENT.

1. **DEED—RESERVATION OF STRIP OF LAND FOR EASEMENT—INTERPRETATION OF COVENANT.**—Where the grantors of a strip of land are owners of the land on either side of the strip, a covenant in the deed that the strip is not to be used for building purposes, but is to be held by the grantee until the city needs it for a public street, when he will convey it to the city upon payment to him of the amount he has paid the grantors therefor, while not sufficient to effect a dedication of the strip as a public street, is sufficient, as between the parties, to constitute a reservation in favor of the owners of the adjoining lands of such rights as they would have in a public street,

EASEMENT (Continued).

and also as a reservation to them of a negative easement prohibiting the erection of any building on the strip. (*Weller v. Brown*, 216.)

2. **FORMER DECISION ON APPEAL—LAW OF CASE.**—The former decision on this appeal embodies the law of the case and is controlling on this appeal, although on the second trial the deed was reformed by adding to the covenant, limiting the use of the land to a public street, a contemporaneous oral agreement as to the holding of the land for the city. (*Id.*)
3. **COSTS IN SUIT TO QUIET TITLE—RIGHT OF PLAINTIFF TO RECOVER.**—Where the only material issue, in a suit by a grantee of the strip to quiet title, is the existence of an easement in favor of the defendant, as to which judgment is awarded him, the plaintiff, though adjudged to be the owner of the fee, is not entitled to costs. (*Id.*)

ELECTION.

1. **INTENTION OF VOTER—ASCERTAINMENT FROM BALLOT ALONE.**—As a general rule the intent of a voter must, in the first instance, be ascertained from the ballot itself, and such intent cannot, by proof of extrinsic circumstances, be shown to be other than that plainly and unequivocally expressed upon the face of the ballot. (*Fitzsimmons v. Wilks*, 56.)
2. **EXTRINSIC CIRCUMSTANCES—ADMISSIBILITY TO SHOW INTENT OF VOTER.**—But this rule is subject to the exception that where the intent of the voter is doubtful, the ballot must be construed as any other paper writing, and therefore evidence of facts and circumstances of public notoriety concerning the candidates and connected with the election may be resorted to for the purpose of ascertaining the voter's intention. (*Id.*)
3. **BALLOTS BEARING ONLY SURNAME OF CANDIDATE—WHETHER MAY BE COUNTED—FACTS AND CIRCUMSTANCES.**—Ballots cast at a special election to fill the office of justice of the peace, upon which the voters, in writing in the name of a candidate, merely wrote his surname, are properly counted, if it appears that he was the only avowed, known, and active candidate by that name for the office, and that the only other persons of that name residing in the township were his wife and two sons, who all endeavored to accomplish his election. (*Id.*)
4. **PRIMARY ELECTION LAW—CONTEST TO NOMINATIONS—TIME FOR FILING—WHEN COMMENCES.**—The five days' time provided by the primary election law of 1913 (Stats. 1913, p. 1379) for filing of contests to nominations of candidates for office does not begin to run until the board of supervisors has declared the result of the canvass of the returns, and contests filed on the fifth day after the supervisors have declared the result of the canvass of the

ELECTION (Continued).

returns are filed within due time. (*Miller v. Superior Court of the County of Kern*, 607.)

5. **AFFIDAVIT OF CONTESTANT—BASIS OF CONTEST.**—The affidavits of the candidate, provided for by section 28 of said act, is the basis of the contest in which the ballots may be recounted before the superior court. (*Id.*)
6. **CANVASS OF RETURNS—DELAY OF SUPERVISORS—RIGHTS OF CANDIDATES.**—The portion of the primary election law relating to the canvass of returns contemplates prompt action in order that the names of the persons nominated may be known in due time, so that they may be placed upon the ballot for the November election, and careful compliance with the provisions of the law as to the time within which the several acts shall be done is necessary; but this does not compel a construction of the statute, which, in some instances of neglect or misconduct, would make it impossible to ascertain the candidates between whom the choice must be made at the final election. If, by reason of neglect or misconduct, it should appear, after the expiration of the time named in the statute, that the board of supervisors would not declare the result of the canvass, any elector within the county or district might institute appropriate proceedings to compel action by these officers. (*Id.*)
7. **CONTEST TO NOMINATIONS—VOTERS NOT ON REGISTER—ABSENCE OF ORIGINAL AFFIDAVITS OF REGISTRATION—COURT POWERLESS TO RECEIVE EVIDENCE OF.**—The refusal of the election officers in a primary election to receive the votes of electors whose names did not appear upon the register, and whose original affidavits or duplicates thereof were not at the time in the office of the county clerk, where they were required by law to be, which voters, the affidavit of contest alleges, registered in accordance with law, and would have voted for the contestants, if permitted to cast their ballots, is not a proper ground of contest, and the superior court in a contest to nominations is without right or jurisdiction to receive offered evidence of such facts. (*Id.*)
8. **CONTEST SPECIAL PROCEEDING—JUDGMENT NONAPPEALABLE—ILLEGAL GROUNDS OF CONTEST—WHEN PROHIBITION LIES.**—Ordinarily the acceptance of such testimony and the use of it by the court in determining the contest would be merely an appealable error, committed by the court in the exercise of its jurisdiction and not in excess of such jurisdiction; but since the contest provided for in section 28 of the primary election law of 1913 is a special proceeding, concerning which it is provided that "such a decision or judgment of the court shall be final in every respect and no appeal can be taken therefrom," it follows that there would be no adequate remedy at law if the superior court, assuming jurisdiction of an alleged contest, should attempt to hear and determine said

ELECTION (Continued).

contest upon allegations which do not legally constitute a ground of contest, and a judgment based upon such alleged fact would be in excess of the jurisdiction of the court and constitutes a proper subject for a writ of prohibition. (Id.)

See Intoxicating Liquors, 1, 3.

EMINENT DOMAIN.

1. **CONSTRUCTION OF RAILROAD—PROBABLE DAMAGES BY FLOOD WATERS—EXPERT TESTIMONY.**—In an action to condemn land for a right of way for a railroad, it is proper to allow expert testimony to the effect that the market value of plaintiff's land will be greatly depreciated by the fact that the railroad, as it is intended to be constructed, will hold back flood waters and thereby cause damage to said land. (*Colusa and Hamilton R. R. Co. v. Glenn*, 634.)
2. **MEASURE OF DAMAGES.**—In such a case the rule of damages is the difference between the value of the land immediately before and after the taking of the right of way, the real question in such cases being how much the market value of the property has been diminished by taking the right of way therefrom. In determining and fixing such damages, all matters and conditions which may reasonably be expected to follow the location and operation of the road and effect the value of the land should be considered. (Id.)
3. **CONDEMNATION OF LAND—RIGHT OF WAY.**—Judgment vacated as the effect of the affirmance of the order granting a new trial in *Colusa and Hamilton Railroad Company v. Glenn*, ante, p. 634. (*Colusa and Hamilton Railroad Company v. Glenn*, 807.)

See New Trial, 10, 11.

EMPLOYER AND EMPLOYEE. See Negligence, 1-3.

ESTOPPEL. See Banks, 4, 6; Brokers, 3; Community Property, 2; Dedication, 6; Pleading, 4; Sale, 17; Surety, 3; Vendor and Vendee, 5-9.

EVIDENCE.

1. **WITNESS—CONCLUSION CONCERNING EFFECT OF TRANSACTION.**—A witness may not testify as to his conclusions concerning the effect of a transaction, even where the facts themselves are disclosed. (*Hanson v. Sherman*, 189.)
2. **WEIGHT AND CREDIBILITY—NUMBER OF WITNESSES.**—The rule that when the evidence in a civil case is contradictory, the decision must be made according to the preponderance of evidence, contemplates that the court will be controlled by the weight of the evidence, as indicated by the apparent credibility of the witnesses, rather than by their mere numerical preponderance. Witnesses are

EVIDENCE (Continued).

not counted, but their testimony is weighed. (*Baucom v. Baucom*, 108.)

See Account Stated, 3; Agency, 10-12; Appeal, 8; Attorney and Client, 2, 3, 5; Corporation, 4-8; Criminal Law, 1, 2, 8-11, 14-16, 19, 22-25, 27-37, 45-48, 58, 59, 65, 71, 73, 74, 77-82, 85, 87, 96, 110-114, 121-129, 133, 137-139, 143-150, 156-159, 162, 171, 175, 179-182, 184, 187; Divorce, 1, 2; Election, 1, 2, 7; Eminent Domain, 1; Extradition; Fraud, 10; Gift, 5, 6; Insurance, 2-4, 7-9; Negligence, 8, 12, 14-20, 31; New Trial, 6, 8, 10-12; Partnership, 2-5; Quieting Title, 3, 4; Sale, 3, 4, 18; Vendor and Vendee, 5, 9.

EXECUTION. See Appeal, 9; Corporation, 10-12; Mandamus, 3-5.

EXTRADITION.

1. SUFFICIENCY OF PAPERS—POWER OF COURTS TO GO BEYOND EXECUTIVE WARRANT AND DETERMINE.—Upon the application of a person held for extradition as a fugitive from justice to be discharged on *habeas corpus*, the court is empowered to go beyond the executive warrant and examine and determine the question of the sufficiency of the papers upon which the executive has acted in complying with the demand of the demanding state. (*Matter of Shoemaker*, 551.)
2. DECISION OF GOVERNOR ONLY PRIMA FACIE CORRECT.—The decision of the governor makes only a *prima facie* case, and it is competent for a court on *habeas corpus* to inquire into the correctness of his decision and discharge the prisoner. (*Id.*)
3. EVIDENCE ON WHICH FUGITIVE IS HELD—RIGHT OF COURTS TO REVIEW.—Where the evidence adduced before the governor upon the question whether the prisoner whose extradition is sought is a fugitive from justice of the demanding state is in substantial conflict, the finding of the executive that he is such fugitive will not be set aside by the courts, but such question of fact is a subject which may be reviewed by the courts, and upon which the prisoner may be discharged from custody, if it is made to appear that he was not within the borders of the demanding state at practically the precise time at which the alleged crime upon which he is proposed to be extradited was committed. (*Id.*)
4. PREREQUISITES TO EXTRADITION OF FUGITIVE—SHOWING NECESSARY TO BE MADE BY DEMANDING STATE.—It must appear to the governor of a state to whom a demand in extradition proceedings is presented, before he can lawfully comply with it: 1. That the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled by an indictment or an affidavit certified or authenticated by the governor of the state making the demand; and 2. That the person demanded is

EXTRADITION (Continued).

a fugitive from the justice of the state the executive authority of which makes the demand. (Id.)

5. **QUESTIONS OF LAW AND OF FACT REVIEWABLE ON HABEAS CORPUS.**—The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*; the second prerequisite involves a question of fact whether the decision of the governor that the prisoner is a fugitive from the justice of the demanding state is well founded or justified, and it also is subject to judicial review on *habeas corpus*. (Id.)
6. **JUDICIAL REVIEW OF ACTION OF EXECUTIVE—SUFFICIENCY OF EVIDENCE—DISCHARGE OF PRISONER.**—As the executive, before he can authorize the extradition of a resident of his state to another for trial on a criminal charge, must be shown by competent proof that the person whose extradition is sought is a fugitive from the justice of the demanding state, it is within the legal competence of courts to review the action of the executive in that respect, and to discharge the prisoner if it is found that the exercise of the executive authority, so far as that fact is concerned, was predicated upon insufficient proof, or in the presence of evidence offered by the prisoner sufficient to destroy the force of the *prima facie* showing by the state upon that point. (Id.)
7. **PRESENCE OF ACCUSED WITHIN DEMANDING STATE AT TIME OF CRIME—REVIEW OF QUESTION.**—The right to review on *habeas corpus* the question whether or not the petitioner was in the demanding state when the crime for which his extradition is requested was committed, is not precluded on the ground that it involves the question of his guilt or innocence of the crime, as attempting to set up an *alibi*, for the question presented is not whether the petitioner was present at the scene of the alleged crime when it was committed, but whether he was within the borders of the demanding state on that day, and if it is not thus shown, he is entitled to his discharge. (Id.)
8. **JURISDICTIONAL FACT—PRESENCE OF PRISONER WHEN CRIME COMMITTED.**—Before a warrant of extradition can be sustained, it must appear as a jurisdictional fact that the prisoner is a fugitive from justice; that is, it must be shown that he was actually present in the demanding state when the crime was committed. Mere constructive presence is not enough. (Id.)
9. **INDICTMENT ACCOMPANYING DEMAND FOR FUGITIVE—ALLEGATION AS TO DATE OF CRIME—ABSENCE OF ACCUSED AT TIME ALLEGED.**—Where an indictment accompanying a demand for extradition charges the commission of a crime without qualification and unequivocally on a certain date, and by neither specific nor general language pretends to fix or allege any other date, it must clearly appear by competent proof, direct or circumstantial, that the accused was in

EXTRADITION (Continued).

the demanding state on that day, and if it is not thus shown, he is entitled to be discharged. (Id.)

10. **FLIGHT OF ACCUSED—INDICTMENT AS EVIDENCE.**—An indictment charging a person with the commission of a certain crime in the demanding state, constitutes, if any at all, very remote evidence of flight or of the fact that the accused is a fugitive from justice. (Id.)
11. **PRESENCE OF ACCUSED IN DEMANDING STATE AT TIME OF CRIME—PROOF CONCERNING.**—If in support of the application for a warrant of extradition, the only affidavits presented are those which aver the presence of the accused in the demanding state eighteen days prior and three weeks subsequent to the date alleged in the indictment, such showing falls short of satisfactorily establishing that he is a fugitive from justice; but if it is conceded that such affidavits, together with the conclusion stated in the affidavit of the state's attorney that the accused "is a fugitive from justice," are sufficient to make out a *prima facie* case, yet the same can be overcome by a slight adversary showing, and is overcome by affidavits on behalf of the accused establishing that he was not in the demanding state at any time within two weeks of the alleged date of the crime. (Id.)
12. **DATE OF CRIME—NECESSITY OF SHOWING OR ESTABLISHING EXACT TIME.**—There is no analogy between the general proposition that upon the trial of one charged with crime it is not required that the people shall prove, in order to sustain a conviction, that the crime was committed at the precise date specified in the indictment, and the proposition involved here, where, to constitute a person a fugitive from justice, it is indispensably necessary to show that the person whose extradition is sought was in the demanding state at the exact time of the commission of the offense with which he is charged. (Id.)

FALSE IMPRISONMENT.

1. **ARREST OF PERSON SUSPECTED OF CRIME—DELAY IN PLACING MATTER BEFORE MAGISTRATE.**—If a sheriff, believing a person has committed an assault with intent to murder, arrests him without warrant, but instead of promptly taking him before a magistrate, as required by section 849 of the Penal Code, detains him awaiting the outcome of the injuries suffered by the victim of the assault, in order to know what charge to place against him, the detention is unlawful and the officer is liable therefor. (*Salo v. Smith*, 295.)
2. **WANT OF PROBABLE CAUSE—INFERENCE FROM UNDISPUTED ALLEGATION—ADMISSION IN ANSWER.**—In an action against the sheriff to recover damages for such arrest and detention an admission in the complaint that the defendant, in arresting and detaining the plaintiff, acted upon probable cause, removes any element of malice which

FALSE IMPRISONMENT (Continued).

might be inferred from a general undisputed allegation of an arrest effected without a warrant. (Id.)

3. **ABSENCE OF MALICE—CIRCUMSTANCES SHOWING—MITIGATION OF DAMAGES.**—An allegation in the answer that the delay of the sheriff in preferring a formal complaint before a magistrate was due to uncertainty as to the nature of the charge which the circumstances might require should be made, whether that of murder or of assault to commit that crime, such uncertainty arising by reason of a doubt existing at the time of the arrest and for a long period thereafter as to whether the victim of the assault would recover from or succumb to the serious wounds inflicted upon him, shows the absence of malice, and constitutes an element which the court is authorized to consider in mitigation of damages. (Id.)
4. **NOMINAL DAMAGES—WHEN PROPERLY AWARDED FOR FALSE IMPRISONMENT.**—If the complaint merely alleges the wrongful detention, and damages in the sum of twenty-five thousand dollars, while admitting the absence of malice, and the court is not specifically apprised of the extent of the injury suffered from the detention, an award of nominal damages only is justified. (Id.)

FALSE PRETENSES. See Criminal Law, 54-59.

FINDINGS.

1. **UNCERTAINTIES—CONSTRUCTION IN FAVOR OF JUDGMENT.**—It is a rule of law that any uncertainties or ambiguities in findings must be construed, if possible, so as to support the judgment. (*Hambright & Walsh Company v. Provident Pledge Corporation*, 600.)
2. **FINDINGS OF PROBATIVE AND ULTIMATE FACTS—INCONSISTENCY.**—Where the trial court makes both probative and ultimate findings and the one set is inconsistent with the other, the former will not, in general, control, limit, or modify the latter. (*Breeze v. International Banking Co.*, 437.)
3. **APPEAL FROM JUDGMENT—CONSIDERATION OF PROBATIVE FACTS.**—Upon an appeal on the judgment-roll alone, only the ultimate facts found by the court, not the probative facts which have no proper place in the findings, can be considered. (Id.)
4. **FINDING OF PROBATIVE FACT—WHEN CONTROLS ULTIMATE FACT.**—It is only in those cases where it clearly appears that the ultimate fact found is based upon and deduced from findings of probative facts, and it is plain that the latter do not justify or support the ultimate fact found, that the findings of probative facts will control that of the ultimate fact and so bereave the judgment of support. (Id.)

See Claim and Delivery, 1, 2; Damages, 3; Fraud, 7, 8; Insurance, 18; Negligence, 31; New Trial, 9; Partnership, 4; Sale, 18; Vendor and Vendee, 9.

FISH AND GAME LAW.

1. **DIVISION OF STATE INTO DISTRICTS—TITLE OF ACT.**—The act of June 16, 1913 (Stats. 1913, p. 988), entitled "An act to amend an act entitled 'An act to divide the state of California into six fish and game districts, approved March 21, 1911, by adding a new section thereto," is unconstitutional, for instead of merely adding a new section, the act purports not only to divide the state into seven fish and game districts, but in fact otherwise materially changes and amends every section of the original act of 1911 (Stats. 1911, p. 425.) (Matter of Mascolo, 92.)
2. **VOID AMENDATORY STATUTE—EFFECT ON ORIGINAL ACT.**—Such act being void, it is inoperative for any purpose and effects no change whatsoever in the original act of 1911, whereby Los Angeles County was designated as being in the sixth fish and game district. (Id.)
3. **SECTION 636½ OF PENAL CODE—UNIFORMITY OF OPERATION—SPECIAL OR LOCAL LAW.**—Section 636½ of the Penal Code, enacted in 1913 pursuant to section 25½ of article IV of the constitution authorizing the legislature to create fish and game districts and enact such laws for the protection of fish and game therein as it may deem appropriate to the respective districts, which section provides that "every person who at any time shall cast, extend, set, draw, use, or continue or assist in casting, extending, setting, drawing, using, or continuing any paranzella, or trawl net for catching fish shell-fish, shrimp, or crabs in the waters of fish and game district six or in the waters of Monterey Bay, shall be guilty of a misdemeanor," is not in contravention of section 11 of article I of the constitution requiring that "all laws of a general nature shall have a uniform operation"; nor of subdivision 2, section 25 of article IV, which prohibits the passage of local or special laws "for the punishment of crimes or misdemeanors." (Id.)
4. **TITLE OF ACT MORE COMPREHENSIVE THAN ACT ITSELF.**—Nor does such act contravene section 24 of article IV of the constitution, which provides that "every act shall embrace but one subject, which subject shall be expressed in its title." While the title prohibits the use of lompara, paranzella, trawl or drag nets, the inhibition in the body of the act is directed to paranzella and trawl nets only; but the fact that the title is broader than the act itself does not render the act obnoxious to the section of the constitution in question. (Id.)
5. **STATUTE VOID IN PART—WHETHER INVALID IN TOTO.**—Although a statute may be invalid or unconstitutional in part, the part that is valid will be sustained if it can be separated from that part which is void. (Id.)
6. **SPECIAL LAW FOR PUNISHMENT OF CRIME—SECTION 636½ OF PENAL CODE.**—Such section 636½ of the Penal Code is not invalid because of subdivision 2, section 25 of article IV of the constitution pre-

FISH AND GAME LAW (Continued).

hibiting the legislature from passing local or special laws for the punishment of crimes and misdemeanors, since that provision of the constitution is qualified and limited by section 25½ of article IV, subsequently adopted. (Id.)

7. **INTERPRETATION OF CONSTITUTION — REPUGNANT PROVISIONS.**—A construction which raises a conflict between parts of a constitution is inadmissible, when by any reasonable interpretation they may be made to harmonize, and in case of irreconcilable repugnancy the provision last in order of time should prevail. (Id.)

FIXTURES.

1. **TEMPORARY WHARF USED TO FACILITATE CONSTRUCTION OF QUAY WALL.**—A wharf built upon piles driven into the ground on the land side of a quay wall along a city water front and used to pass materials over and facilitate the construction of the quay and intended to be removed when the quay was finished, is not a fixture, but personal property, and upon the insolvency of the contractor and his abandonment of the work the materials in the wharf do not become the property of the city under sections 1196 and 1200 of the Code of Civil Procedure. (Hogan Lumber Company v. City of Oakland, 130.)
2. **TEST FOR DETERMINING WHETHER OR NOT STRUCTURE IS FIXTURE.**—Whether a structure is a fixture or not depends upon the nature or character of the act by which it was erected, and the purpose for which it was intended to be used. (Id.)
3. **MATERIALS AS PROPERTY OF OWNER OF STRUCTURE—SECTIONS 1196 AND 1200 OF THE CODE OF CIVIL PROCEDURE.**—Sections 1196 and 1200 (since repealed) of the Code of Civil Procedure apply, and make materials furnished the property of the owner of the structure when they are to become part of the structure, but where they are not to be used in and incorporated into the structure to be built, they cannot be said to belong to the owner. (Id.)

FORCIBLE ENTRY AND DETAINER.

GIST OF ACTION—SUFFICIENCY OF COMPLAINT.—An allegation of forcible entry alone, unaccompanied by an allegation showing that defendant retains possession of the premises so forcibly entered, will not warrant an action under the provisions of chapter IV, title III of the Code of Civil Procedure, for forcible entry and detainer. The real gist of the action is the detention of the premises. (Davies v. Stark, 519.)

FORFEITURE.

1. **WATER COMPANY — CHARGING EXCESSIVE RATES — FORFEITURE OF FRANCHISE—ACTION BY INDIVIDUAL TO DECLARE—CONSTITUTIONAL LAW.**—The statutory provision (Stats. 1881, p. 54) that "any person,

FORFEITURE (Continued).

company, association or corporation charging, or attempting to collect from the persons, corporations, or municipalities using water, any sum in excess of the rate fixed as hereinbefore designated, shall, upon the complaint of . . . any water rate payer, and upon conviction before any court of competent jurisdiction . . . forfeit the franchise and waterworks of such person, company, association, or corporation to the city and county, city or town, wherein the said water is furnished and used," is unconstitutional in so far as it purports to confer upon a water rate payer the power to compel a forfeiture of the franchises and works of a water company because of an alleged overcharge. (*Hatfield v. Peoples' Water Company*, 502.)

2. **STATUTORY PROVISION — CONFLICT BETWEEN AND CONSTITUTIONAL PROVISION RELATIVE TO WATER RATES.**—Such statute, so far as its forfeiture clause is concerned, is inconsistent with and in contravention of that provision of the constitution which regulates the establishment of water rates, and declares that "any person, company, or corporation collecting water rates in any city and county or city or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use." (*Id.*)
3. **FORFEITURE OF FRANCHISE—STATE AND CITY ONLY PARTIES INTERESTED.**—Only two parties can be said to be interested in the procurement of the forfeiture provided for in the constitution, namely,—the state in the first instance, and, secondly, the city where an excess rate may have been collected. (*Id.*)
4. **MISCONDUCT OF CORPORATION DOES NOT IPSO FACTO WORK FORFEITURE OF CHARTER.**—Conduct constituting a cause for the forfeiture of corporate charters and franchises will not *ipso facto* operate to produce such a forfeiture; notwithstanding such conduct, the corporation continues to exist until the sovereignty which created it shall procure an adjudication of forfeiture and enforce it. (*Id.*)
5. **REVOCATION OF CHARTER CAN BE ACCOMPLISHED ONLY BY SOVEREIGNTY.**—The revocation of corporate charters and franchises is a sovereign right which can be exercised only by the state or in its name. (*Id.*)

See Water and Water-rights.

FRANCHISE. See Forfeiture.

FRAUD.

1. **ACTION TO RECOVER FOR FALSE REPRESENTATIONS—SHOWING NECESSARY TO BE MADE BY PLAINTIFF.**—Fraud is the basis of an action for damages for deceit; and when such action arises out of alleged

FRAUD (Continued).

false representations of a material fact the plaintiff, in order to prevail, must ordinarily show not only that such representations were knowingly false and made with intent to deceive, but that the plaintiff, relying upon such false representations and while acting with reasonable prudence, was thereby deceived into doing something to his detriment. (*Gratz v. Schuler*, 117.)

2. **RELIANCE UPON FALSE REPRESENTATIONS—OPPORTUNITY FOR INVESTIGATION.**—If one party to a contract is justified in relying and does in fact rely upon false representations, his right of action for rescission or for damages for deceit is not destroyed merely because he does not avail himself of the means of knowledge immediately at hand as to the truth or falsity of the representations; but if he does avail himself of an opportunity to test the truth of the representations made, and thereby discovers prior to the consummation of the contract that such representations are false, he will not be heard to say that he was deceived by them. (*Id.*)
3. **SALE OF PANORAMA PICTURE MACHINE—REPRESENTATIONS BY SELLER AS TO EARNING CAPACITY.**—The buyer of a panorama picture machine cannot recover damages for false representations made by the seller as to its earning capacity, if it appears that, before the consummation of the sale, a test exhibition was had at which the receipts fell far below the earning capacity as represented. (*Id.*)
4. **REPRESENTATION AS TO RENTAL VALUE OF DEVICE.**—After thus having discovered the falsity of the representations of the earning capacity of the panorama, the buyer is not entitled to recover damages on the ground of an alleged false representation that the panorama could be placed in a certain amusement place for a specified monthly rental, the truth or falsity of which representation was readily ascertainable. (*Id.*)
5. **FALSE STATEMENT AS TO ONE MATTER—NOTICE THAT OTHER STATEMENTS MAY BE FALSE.**—Where a party to a contract ascertains that the other party has falsely represented one material matter in the transaction, it is notice to him that the representations as to other matters may also be false, and it is therefore incumbent upon him to thereafter make a full investigation as to the truth or falsity of all such matters. (*Id.*)
6. **INTOXICATION OF BUYER—SUBSEQUENT RATIFICATION OF TRANSACTION.**—If the buyer was so intoxicated during the original negotiations for the sale of the panorama that he did not realize what he was doing, his subsequent consummation of the sale when sober constitutes a ratification of the original agreement which precludes him from repudiating the transaction, or asserting that advantage was taken of his intoxicated condition to defraud him. (*Id.*)
7. **ACTION TO RECOVER MONEY—FRAUD AS BASIS OF RECOVERY—FINDINGS—INCONSISTENCY BETWEEN PROBATIVE AND ULTIMATE FACTS.**—

FORFEITURE (Continued).

company, association or corporation charging, or attempting to collect from the persons, corporations, or municipalities using water, any sum in excess of the rate fixed as hereinbefore designated, shall, upon the complaint of . . . any water rate payer, and upon conviction before any court of competent jurisdiction . . . forfeit the franchise and waterworks of such person, company, association, or corporation to the city and county, city or town, wherein the said water is furnished and used," is unconstitutional in so far as it purports to confer upon a water rate payer the power to compel a forfeiture of the franchises and works of a water company because of an alleged overcharge. (*Hatfield v. Peoples' Water Company*, 502.)

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FRAUD (Continued).

In this action by a partner against his copartner and a bank to recover a certain sum of money on the ground that they conspired to induce him to transfer his interest in a partnership order for the payment of money, for less than its value, by concealing the fact that the order was to be paid by a solvent third person, wherein the plaintiff contends that the judgment in favor of the bank is not supported by the findings because of an inconsistency between the probative and the ultimate facts found by the court, it is held that there is no real inconsistency, and that even if there were the same would not support his appeal, since the ultimate facts were not based upon or deduced from the probative facts, nor in any degree dependent upon them. (*Breeze v. International Banking Corporation*, 437.)

8. **FRAUDULENT ACTS OF PARTNER—NONPARTICIPATION BY CODEFENDANT—PRESUMPTION ON APPEAL.**—Upon this appeal from the judgment upon the judgment-roll alone, the finding that the bank had no hand or took no part in the fraudulent acts by means of which the plaintiff was wrongfully deprived of his interest in the order, can rest upon the presumption, which must be indulged when the appeal, as here, is not supported by a bill of exceptions or statement or other duly authenticated record of the evidence, that there was received into the record evidence sufficient to justify and support it. (*Id.*)
9. **TRANSFER TO DEFAUD CREDITORS—CONSTRUCTION OF SECTIONS 3439 AND 3442, CIVIL CODE.**—Sections 3439 and 3442 of the Civil Code should be liberally construed with a view to effect their purpose, which is to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach, or, in other words, to compel a person engaging in business to take the hazards and risks thereof as well as the chances of profit. (*Borgfeldt v. Curry*, 624.)
10. **FRAUDULENT TRANSFER—SUFFICIENCY OF EVIDENCE TO SHOW.**—In this action to quiet title to certain real property, in which defendant asserts an interest in the property, by virtue of the levy of an attachment thereon, and claims that a transfer of the property to plaintiff by her husband was fraudulent as against him, it is held that the evidence shows the transfer to have been made in contemplation of insolvency, which renders it void under sections 3439 and 3442 of the Civil Code, and that the finding of the trial court that the transfer was not fraudulent as to creditors is not sustained by the evidence. (*Id.*)

See Account Stated, 1, 2; Banks, 4; Criminal Law, 42-53; Partnership, 1.

GAME LAWS. See Fish and Game Law.

GARNISHMENT. See Attachment, 1, 2; Mechanics' Lien, 2.

GIFT.

1. **GIFT TO BE CONSUMMATED IN CASE OF DEATH—PACKAGE OF STOCK AND BONDS—INDORSEMENT ON WRAPPER.**—An understanding between a man and his daughter that each of them shall prepare papers disposing of their respective properties, which are to be placed in their respective packages, and that, in case it becomes apparent to either that the other is about to die, the former shall put the contents of the package or envelopes of the one about to die into the possession of the parties to whom their inclosures are respectively addressed, is not changed, nor is the agency to make delivery of the package or envelopes of the daughter containing indorsed stock and bonds revoked, by the written indorsement by her on the brown paper wrapper, "In case of my death to be opened only by Robert Bragg, Sr., or Rebecca Bragg Martenstein," who are her father and sister and who are designated as executors in her contemporaneous will disposing of the rest of her estate, there being no direction in any of the writings as to the delivery of the inclosures upon the opening of the package. (Bragg v. Martenstein, 199.)
2. **INTERPRETATION OF WORD "ONLY" ON WRAPPER OF PACKAGE.**—The word "only," contained in such indorsement, is a limitation upon the persons who might open the package, and not upon the time when it is to be opened. (Id.)
3. **CONTEMPORANEOUS WRITINGS—INTERPRETATION TOGETHER.**—The writing upon the outside of the wrapper and the writings upon and within its inclosures, if made contemporaneously and as parts of the same transaction by the decedent, are to be construed together; but no part of such writings is to receive an interpretation which will render them unlawful, inoperative, indefinite, unreasonable, and incapable of being carried into effect. (Id.)
4. **CIRCUMSTANCES UNDER WHICH WRITINGS WERE MADE—RECOURSE TO IN DETERMINING THEIR MEANING.**—It is the duty of a court, when such documents come before it, to place such an interpretation upon the obscure direction of the writing upon the outside of the wrapper as will not only give a reasonable effect to what the writer intended by it, but in so doing, will also render effectual and valid the intent and purpose of the writer as expressed in its inclosures; and in order to do this, it is the province of the court to have recourse to the circumstances under which these several contemporaneous writings were made, as disclosed by the undisputed evidence in the case. (Id.)
5. **INTERPRETATION OF CONTRACT—WHEN QUESTION OF LAW.**—When a writing requires explanation, and the circumstances surrounding its creation, as disclosed by the evidence, are undisputed, it becomes a question of law for the court, not a question of fact for

GIFT (Continued).

the jury, to determine what the proper construction of the writing should be. (Id.)

6. **INTENTION OF DECEASED — EVIDENCE ESTABLISHING — DIRECTION OF VERDICT.**—In this action by the executor of the will of the daughter to recover damages for the alleged conversion of the stocks, the undisputed facts as disclosed by the plaintiff himself, the father, show that it was the life-long purpose and intent of his daughter that her four sisters should be invested with the ownership of the respective shares of stock and bonds which were inclosed in the envelopes respectively indorsed and directed to them, and that this should be done by the delivery of such envelopes to the persons to whom they were directed when it became apparent to her father that she was about to die, that he was to act as her agent in the execution of such purpose, and that no intent on the part of the daughter to change this plan or revoke this agency was ever manifested by her to him during her life; and the court, with all these facts before it, properly instructed the jury to return a verdict for the defendant. (Id.)

7. **COSTS OF ADMINISTRATION OF ESTATE—PAYMENT OUT OF DIVIDENDS FROM STOCKS.**—An understanding between the daughter and her father that the dividends and income from the stocks and bonds which he had put into the possession of her sisters was to be applied to the costs of administering her estate, is not a condition in any way affecting the validity of the gifts themselves, but at the most an obligation cast upon the respective donees to apply these revenues to the indicated purpose. (Id.)

8. **GIFT TO BE CONSUMMATED IN CASE OF DEATH—INTENTION.**—Judgment and order refusing a new trial reversed on the authority of *Bragg v. Martenstein*, *ante*, p. 199. (*Bragg v. Cumming*, 804.)

See Community Property.

GOODS SOLD AND DELIVERED. See Pleading, 1-4.

GRANTOR AND GRANTEE. See Deed; Vendor and Vendee.

GUARANTY.

1. **CONTRACT OF GUARANTY—GUARANTY OF PAYMENT OF ACCOUNT AT DUE DATE—CHANGE OF TIME OF PAYMENT—WHEN GUARANTOR NOT EXONERATED.**—When a contract provided, in consideration of past and future deliveries of lumber and other materials, for a guaranty of payment for the same at "due date," and at the time the guaranty was executed the sales were upon a credit of sixty days, but there was no usage of trade or contract between the parties under which the debtor was entitled to a credit upon all sales at sixty days, and there is nothing to show that the creditor knew that the guarantor was aware of the length of credit that was being extended, the

GUARANTY (Continued).

creditor was authorized to extend the credit for any reasonable length of time, and the guarantor was not exonerated from his contract of guaranty by the creditor accepting a series of notes thirty days after date of the sale payable in each case more than sixty days thereafter, where the term of credit was not unreasonable and did not materially change the contract of guaranty. (*Tyson v. Reinecke*, 696.)

2. **DUE DATE—COMMERCIAL MEANING OF.**—While there seems to be no judicial interpretation of the term "due date," in commercial transactions, generally speaking, it means that an account will be paid at the time fixed or agreed upon for payment. (*Id.*)
3. **PAYMENT OF ACCOUNT—WHEN NOTES NOT ACCEPTED AS—CONFLICTING EVIDENCE—FINDINGS CONCLUSIVE.**—It is held in this action that, as the evidence is conflicting upon the question as to whether certain promissory notes were given in payment of the account in question, the finding of the trial court to the effect that they were not given as such payment, cannot be disturbed on appeal. (*Id.*)

See Attachment, 4.

GUARDIAN AND WARD. See Tenants in Common.

HABEAS CORPUS.

1. **REHEARING—POWER TO GRANT.**—After judgment in *habeas corpus* proceedings, either remanding or discharging the petitioner, the district court of appeal has no power to grant a rehearing; and it is immaterial that he may be allowed to give bail for his appearance pending the hearing of his application. (*Matter of Shoemaker*, 551.)
2. **FINALITY OF JUDGMENT IN HABEAS CORPUS.**—A proceeding in *habeas corpus* is finally and definitely ended by judgment. (*Id.*)

See Extradition.

HIGHWAYS. See Streets, Roads, and Highways.

HUSBAND AND WIFE. See Community Property; Divorce; Parent and Child.

INFAMOUS CRIME AGAINST NATURE. See Criminal Law, 60-63.

INFANTS. See Parent and Child.

INJUNCTION. See Office and Officers, 5-7; Water and Water-rights.

INSANE PERSONS. See Criminal Law, 91-95.

INSTRUCTIONS. See Attorney and Client, 4; Criminal Law, 38-41, 49, 57, 115-117, 123, 150, 152, 160, 161, 163-166, 185; Negligence, 21-26; Sale, 5-9.

INSURANCE.

1. **MARINE INSURANCE—CONTRACT OF INSURANCE—CERTIFICATE ISSUED BY BROKERS—INTERPRETATION AND EFFECT.**—A document issued by a firm of insurance brokers to a shipper of canned goods by steamer, certifying that they have insured the goods with a designated insurance company for a stated amount, loss payable to the assured, or order, on surrender of the certificate, and that it is agreed that the certificate represents and takes the place of the original policy and conveys all the rights of the original policy holder for the purpose of collecting any loss or claim as fully as if the property were covered by a special policy direct to the holder of the certificate, and free from any liabilities for unpaid premiums, is not the contract or part of the contract of insurance, but presupposes the issuance of a policy of insurance and necessarily puts the holder upon inquiry to ascertain the terms of the policy in order to determine what rights are secured thereby. (*California Canneries Company v. Canton Insurance Office, Limited*, 803.)
2. **ACTION FOR INJURY TO INSURED GOODS—EVIDENCE OF POLICY OR ITS TERMS.**—In an action against the insurance company to recover for injury to such insured goods, the policy itself, or evidence of its terms, should be introduced in evidence to show the risks that were covered by the insurance and the extent of the defendant's obligation. (*Id.*)
3. **AUTHORITY OF BROKERS TO ISSUE CERTIFICATE—INSUFFICIENCY OF EVIDENCE TO SHOW.**—In this action by the holder of the certificate against the insurance company to recover for injury to the goods while in transit, the evidence is insufficient to show that the brokers were authorized by the insurance company to issue the certificate. (*Id.*)
4. **ENGLISH POLICY CONDITIONS—EVIDENCE TO SHOW MEANING OF EXPRESSION.**—If the certificate shows that the insurance was in accordance with the "English policy conditions," the meaning of such expression becomes a proper and necessary subject of inquiry and testimony is admissible to establish such meaning. (*Id.*)
5. **WARRANTY AGAINST PARTICULAR AVERAGE—LOSS OF PART OF GOODS NOT SEPARATELY INSURED.**—And if the contract of insurance, as thus established, shows a warranty free from particular average, there can be no recovery by the insured for parts of the goods, not separately insured, spoiled by leakage and afterward thrown away on the arrival of the vessel at its destination. In such event there is no total loss or a general average loss, but only a partial and particular average loss. (*Id.*)

INSURANCE (Continued).

- 6. GENERAL AND PARTICULAR AVERAGE DEFINED AND DISTINGUISHED.**—Particular average means a partial loss as distinguished from a total loss or a general average loss. General average is a contribution by the several interests engaged in a maritime adventure to make good the loss of one of them for voluntary sacrifice of a part of the ship or cargo to save the residue of the property and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred for the common benefit and safety of all the interests in the adventure. (Id.)
- 7. SEPARATE INSURANCE ON VARIOUS LOTS—BURDEN OF PROOF.**—If the insured in such a case contends that there was separate insurance on the various lots of goods, the burden of proof is on him to establish his contention. (Id.)
- 8. COLLISION AT SEA — ADMISSIBILITY OF EVIDENCE CONCERNING.**—In such action it is proper for the insurance company to offer evidence that the vessel in which the goods were shipped had been injured in a collision. This is a circumstance tending to show that the vessel was unseaworthy within the contemplation of sections 2681 and 2682 of the Civil Code, and therefore that the implied warranty of seaworthiness was violated and no liability on the part of the defendant attached. (Id.)
- 9. CERTIFICATE OF INSURANCE—SUPPLEMENTING WITH THE PROOF OF POLICY.**—If the insurer relies upon a certificate of insurance, on the injured goods “as per policy No. 76491 (English policy conditions), subject to all the terms and conditions of said policy,” the certificate should be supplemented by proof of the policy itself, if actually issued, or, if not actually issued, of the form of the policy to which the certificate refers. (Id.)
- 10. LIFE INSURANCE—PREMIUM NOTE—EXECUTION BY AGENT OF BENEFICIARY.—LIABILITY OF BENEFICIARY.**—The beneficiary in a life insurance policy, who is not shown to have a vested interest therein, is not liable on a promissory note given for the premium by her agent under a general power of attorney restricting his authority to such acts as are for her “use and benefit.” (New York Life Insurance Company v. Daley, 376.)
- 11. INTEREST OF BENEFICIARY IN INSURANCE — WHEN NOT VESTED.**—Where a policy of life insurance reserves to the insured the right to change the beneficiary upon written request therefor, the interest of the designated beneficiary prior to the death of the insured is that of a mere expectancy of an incompleting gift, subject to revocation at the will of the insured. (Id.)
- 12. POWER OF ATTORNEY—RULES OF INTERPRETATION.**—A formal instrument conferring authority to bind another must be construed strictly in accordance with the plain import of the language of the document, and its interpretation cannot be extended by implication so as to

INSURANCE (Continued).

authorize acts beyond those specified, unless absolutely necessary to carry out the powers expressly delegated. (Id.)

13. **GRANTING NONSUIT—NECESSITY OF FINDINGS.**—Where the record discloses the grounds upon which a motion for nonsuit is based, and the motion is properly granted, findings of fact are not necessary. (Id.)

INTEREST. See Vender and Vendee, 4.

INTERVENTION. See Appeal, 1-5.

INTOXICATING LIQUORS.

1. **LOCAL OPTION ELECTION—RESUBMISSION OF QUESTION AFTER TWO YEARS—COMPUTATION OF TIME.**—The provision of the Local Option Law (Stats. 1909, p. 599) that no election shall be held under the act "within two years of any previous election" thereunder in the same territory, means that if the question is submitted at a special election, the sense of the electors cannot again be taken on the proposition until two years of three hundred and sixty-five days each have passed, but if the first vote is taken at a general election on the first Tuesday after the first Monday in November, another vote may be taken at the next general election on that day the second year following, although the first election was on November fifth and the second one will be on November third, leaving an interval of less than two years of three hundred and sixty-five days each. (Hops v. Poe, 451.)
2. **MEANING OF WORD "YEAR" IN ELECTION STATUTES.**—When the statute uses the term "year" in connection with general elections, the political year is clearly contemplated, but in referring to special elections, since no particular day is specified, the intention is to designate the year of three hundred and sixty-five days. (Id.)
3. **WORD "YEAR"—WHETHER WORD MAY MEAN LESS PERIOD THAN THREE HUNDRED AND SIXTY-FIVE DAYS.**—While the word "year," when used in a statute, ordinarily means a period of three hundred and sixty-five days, still its meaning is, in all cases, dependent upon the subject matter and the connection in which it is used, and it may stand for a period of time less than three hundred and sixty-five days. (Id.)
4. **LOCAL OPTION LAW—PROHIBITION OF SALE OF NONINTOXICATING LIQUORS.**—The legislature did not intend, by the enactment of the Wyllie Local Option Law (Stats. 1911, p. 599), to make it unlawful for one to engage in the business of selling nonintoxicating liquors; it was not the legislative intent to contraband the traffic in spirituous, vinous or malt liquors possessing no intoxicating quality. The legislature aimed the shafts of its denunciation solely against any liquors the use of which would produce intoxication, and, by specify-

INTOXICATING LIQUORS (Continued).

ing the quantity of alcohol which, when used in liquors, would bring them within the condemnation of the statute, it intended to and established a test applicable to all liquors the sale of which was designed by the statute to be prohibited in any territory to which the law might appropriately be made applicable. (*People v. Strickler*, 60.)

5. **PURPOSE OF LOCAL OPTION LAW—INTERPRETATION OF SECTION 21.**—The purpose of such local option law is to suppress drunkenness and traffic in intoxicating liquors in those subdivisions where its operation is invoked, and the rule of *ejusdem generis* is properly applied to section 21 of the act, which provides that "the term 'alcoholic liquors' as used in this act shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contain one per cent, by volume, or more, of alcohol and which is not so mixed with other drugs as to prevent its use as a beverage." (*Id.*)
6. **RULE OF EJUSDEM GENERIS—MEANING AND SCOPE.**—The rule of *ejusdem generis* simply means that "general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general." Otherwise stated, "where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration, the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to or different from, those specifically enumerated." (*Id.*)
7. **LIMITATIONS ON RULE—INTENTION OF LEGISLATURE—GIVING EFFECT TO EVERY PART OF STATUTE.**—This rule of construction is by no means of universal application, and its use is to carry out, not to defeat, the legislative intent. It must yield to another salutary rule of construction, namely, that every part of a statute should, if possible, be upheld and given its appropriate force. (*Id.*)
8. **VIOLATION OF LOCAL OPTION LAW—INSUFFICIENCY OF INFORMATION TO CHARGE.**—An information charging a violation of the Wyllie Local Option Law, which avers that the liquor therein alleged to have been kept for sale by the defendant contained less than the quantity of alcohol specified in section 21 of the act, namely, one per cent, fails to state an offense under the statute. (*Id.*)
9. **RIGHT TO CONDUCT BUSINESS—SELLING LIQUOR NOT INHERENT RIGHT.** It is only a calling not in any way injurious to the community which every one has a right to pursue; and there is no inherent right in a citizen to sell intoxicating liquors. (*McRae v. Pine*, 594.)
10. **REGULATION OF LIQUOR BUSINESS—RESTRICTION AS TO LOCALITY—ARTICLE XI, SEC. 11 OF CONSTITUTION.**—Under article XI, section

INTOXICATING LIQUORS (Continued).

- 11, of the constitution of California, any county, city, town or township has the right to wholly prohibit the carrying on of the retail liquor business, and the power to prohibit includes the power and right to regulate by the imposition of conditions and restrictions, a legal mode of restriction being the determination of the places in the county where such business may or may not be carried on. (Id.)
11. COUNTY ORDINANCE—RETENTION BY SUPERVISORS OF RIGHT TO REGULATE LIQUOR BUSINESS.—A county ordinance regulating and providing for the licensing of various kinds of business, which provides that before a license may issue for carrying on the business of a retail liquor establishment, an application shall be filed with the clerk of the board of supervisors, and that after the publication of certain notices, the board "shall thereupon proceed to hear any testimony offered, either in support of or against such application for license, and may refuse to allow a license to issue thereunder, if, on such hearing, it shall appear to the satisfaction of the board, . . . that in the judgment of said board it would not be for the welfare of the people residing in said precinct or of the county to have the business mentioned in said application carried on in such precinct, . . . or that there is any other sufficient reason for such refusal, whether shown by protest on file, location of business, or otherwise," does not take away from the board its right to refuse to grant a license for such business in any location where, after considering the facts, it is the judgment of the board that the business should not be located in that place, notwithstanding no testimony was offered against an application for a license, or objection made to the personal character of the petitioner, or exception taken to the form, substance, or sufficiency of the petition, or to the regularity of any of the proceedings; and notwithstanding, also, that the majority of the voters in the precinct where the business was to be carried on voted in favor of granting such license at the last general election. (Id.)
12. APPLICATION FOR LIQUOR LICENSE—PROVISION OF ORDINANCE FOR SUBMISSION TO VOTE OF PEOPLE—SUPERVISORS' POWER TO REFUSE NOT AFFECTED BY.—A provision in such an ordinance that no application for either a wholesale or retail liquor license shall be granted unless the petition shows that at the last general election at which the question of granting retail and wholesale liquor licenses was submitted to the vote of the people of the county, a majority of the votes cast upon the question in the voting precinct in which the business was to be carried on, was in favor of granting such license, while preventing the granting of such a license by the board, if a majority of the votes is against it, does not prevent the board refusing such license, although a majority of the votes were in favor of it. (Id.)
13. MANDAMUS—NOT WRIT OF RIGHT—SHOULD NOT ENFORCE TECHNICAL COMPLIANCE CONTRARY TO SPIRIT OF LAW.—The writ of mandamus

INTOXICATING LIQUORS (Continued).

is not wholly a writ of right, but lies, to a considerable extent, within the sound judicial discretion of the court where the application is made; and no court should allow a writ of *mandamus* to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law. (Id.)

14. **WHEN MANDAMUS DOES NOT LIE TO COMPEL GRANTING OF LIQUOR LICENSE.**—*Mandamus* will not lie to compel the board of supervisors to issue a license to the petitioner in such a case, which could only be granted upon a technical construction of the ordinance in his favor, contrary to the spirit of the law which intends that such matters shall remain within the power of regulation of the county through its authorized officers. (Id.)

See Criminal Law, 64-68.

JUDGE. See New Trial, 2, 4, 5.

JUDGMENT.

1. **JUDGMENT ON PLEADINGS—NATURE AND EFFECT—PROVINCE OF COURT.**

A motion for judgment upon the pleadings is, in substance, both a motion and a demurrer. While it is in effect a demurrer, because it challenges the sufficiency of the complaint to state a legal wrong, or that of the answer to state a legal defense, as the case may be, it, at the same time, operates as a motion for the reason that it is an application for an order for judgment, in which latter case the court becomes the exclusive judge of both the law and the facts. (Salo v. Smith, 295.)

2. **JUDGMENT BY DEFAULT—MOTION TO VACATE—GRANTING ON INSUFFICIENT GROUNDS.**—An order vacating a default judgment, which has

been entered against a defendant for failure to plead within the time prescribed by law, is erroneous, if the affidavits in support of the motion therefor merely aver that the defendant, when served with summons, expected to be engaged in business out of town and turned the papers over to his business partner with instructions to have the action defended, and that the latter placed them in a pigeon-hole "and through mistake, inadvertence and excusable neglect did not have an answer put in." (Slater v. Selover, 525.)

3. **AFFIDAVIT OF MERITS—WHEN INSUFFICIENT.**—In such case an affi-

davit of merits is insufficient, which avers "that affiant has a good and meritorious defense to said action, and wishes to defend same, and that affiant has stated his defense to his attorney, who informs him that he has a good defense to said action." The affidavit should show that the defendant stated all the facts of the case to his attorney, not merely those constituting his defense. (Id.)

See Appeal, 12, 14-19, 22; Criminal Law, 7; Elections, 8; Findings, 1, 3; Lease, 4; *Mandamus*, 1-4; New Trial, 9; Practice, 1, 3; *Res Judicata*; *Summons*, 7-13; *Unlawful Detainer*, 3.

JUDGMENT-ROLL. See Appeal, 2; Habeas Corpus, 2.

JUDICIAL NOTICE. See Lease, 11.

JURISDICTION. See Appeal, 20; Criminal Law, 3-6; Elections, 8; Extradition, 8; Parties, 1; Summons, 1.

JURY AND JURORS. See Attorney and Client, 6; Criminal Law, 64.

JUSTICE'S COURT. See Appeal, 19, 20; Criminal Law, 3-6.

LACHES. See Summons, 6.

LAND. See Quieting Title; State Land.

LANDLORD AND TENANT. See Lease; Quieting Title, 1, 2; Unlawful Detainer.

LARCENY. See Criminal Law, 69-82.

LEASE.

1. **MINES AND MINERALS—LEASE OF PROPERTY—ACTION TO RECOVER RENT OR ROYALTIES.**—In an action by the lessor against the lessee of a gold mining claim to recover rents or royalties, a complaint which sets out the execution of a lease of mining property by the plaintiff to the defendant, the entry thereunder by the latter into possession of the premises, the extraction therefrom of a certain value of gold, the amount due the plaintiff under the lease and the payment of all such amount except a stated sum, no part of which has been paid, states a cause of action. (*Northern Light Mining Company v. Blue Goose Mining Company*, 282.)
2. **DEMAND OF PAYMENT—NECESSITY OF ALLEGING.**—An allegation of a demand for the payment of the rent or royalties is not essential to the statement of such cause of action, if the lease is uncertain in not designating whether the rent is payable in gold dust or money, and also in failing to designate any particular day or place of payment. (*Id.*)
3. **FUTILITY OF DEMAND—WHETHER EXCUSES NECESSITY OF MAKING.**—The purpose of a demand in such a case is to afford the defendant an opportunity to comply with it without the annoyance and expense of suit, but when it appears from the answer that a demand would have been unavailing and a mere useless and idle ceremony, the law does not require it. (*Id.*)
4. **JUDGMENT UPON PLEADINGS—WHEN PROPER.**—In such action a judgment on the pleadings is properly granted the plaintiff, if the conclusion necessarily follows from the admitted facts that it is entitled to judgment for the sum claimed, notwithstanding a denial in the

LEASE (Continued).

answer of any sum now due, owing, and unpaid to the plaintiff from the defendant, which denial involves a mere legal conclusion. (Id.)

5. **PLEADING—ALLEGATION IN ANSWER OF CONTRACT DIFFERENT FROM THAT DECLARED UPON IN COMPLAINT.**—An allegation in the answer that after the defendant had notified the plaintiff of an intention to abandon the premises, and while the defendant was actually engaged in moving, the plaintiff employed the defendant to extract gold from certain blocks of unworked ground, lacks responsiveness and relevancy to the cause of action, in the absence of any allegation or circumstance showing that such agreement had any relation to the lease or was intended to modify or affect it in any manner. As a matter of pleading the defendant could not avoid a contract alleged in the complaint by answering that he had made with the plaintiff another and different contract. (Id.)
6. **ABANDONMENT OF LEASED GROUND—ALLEGATION OF CUSTOM.**—An allegation in the answer of a custom among miners permitting a lessee to remove from the premises at any time he chooses, is also unresponsive to the complaint, if it does not appear how this custom could or did impair the right of the plaintiff to receive the rent or royalty provided for in the lease, or in what manner this custom affected the acts of the parties to the contract. (Id.)
7. **CUSTOM OR USAGE—WHEN NOT ADMISSIBLE TO VARY CONTRACT.**—If the terms of the lease are plain as to the period during which mining operations were to be carried on by the lessee, no evidence of custom is admissible on the subject of abandonment of work before the expiration of the term. A contract cannot be varied by evidence of custom or usage; custom can be shown only when the terms of the contract are obscure or uncertain. (Id.)
8. **BREACH OF LEASE BY LESSEE—MANNER OF CALCULATING DAMAGES.**—If before the end of the term the lessee abandoned work on the claim, and the lessor brings an action to recover royalties, in which the lessor proves the total number of cubic yards of gold-bearing gravel that the defendant could have mined between the date of the abandonment and the end of the season, the average gold value of the gravel per yard, and the best obtainable or market percentage of royalty for working the claim at the date of the breach or thereafter, damages figured on the basis of such evidence are not objectionable as being uncertain. Since the difficulty of ascertaining exactly how much the plaintiff was injured arose from the defendant's breach of contract, scant attention will be paid to its complaint that greater accuracy is not obtainable. (Id.)
9. **INTERPRETATION OF LEASE—PROVISION FOR CONTINUOUS WORK.**—A provision in the lease that the defendant would work the properties "as steadily and continuously from the date of this lease as the weather and season of each year would permit during the aforesaid term," did not warrant the defendant in discontinuing the work

LEASE (Continued).

if it proved unprofitable or by reason of any custom alleged to prevail, but obligated it to continue operations during the entire term of the lease, except when prevented by the weather and season of the year. (Id.)

10. **ABANDONMENT OF MINE BY LESSEE—DUTY OF LESSOR TO WORK IT.**—Upon the abandonment of the mining properties by the lessee, the lessor was not required to work the ground, nor obtain another lessee to do so, but it had a right to rely upon the faith of the lessee pledged to the observance of all the terms of the lease, and to recover damages in case of default by the lessee. (Id.)
11. **CUSTOM OF MINERS—JUDICIAL NOTICE.**—In an action by the lessor to recover from the lessee on account of the latter abandoning the mining properties, the court will not take judicial notice of a custom of miners that a lessee, in the absence of an express provision in the lease to the contrary, is authorized to cease work at his pleasure. (Id.)
12. **CONTRACT FOR WORKING MINING PROPERTIES—WHETHER LEASE OR LICENSE.**—If the instrument under which the mining properties were to be worked is styled an "indenture of lease," designates the parties as "lessor" and "lessee," "grants, demises, leases and lets" unto the lessee for a term of years not only the right and privilege of mining but the land itself, provides for the payment of "rent," and contains the forfeiture and entry clauses and those against assigning or subletting which are usually found in leases, it will be regarded as a lease, not a mere license. (Id.)

See Brokers, 1, 2; Negligence, 12-20.

LEWDNESS. See Criminal Law, 83, 84.

LIBEL. See Criminal Law, 85-90.

LIENS. See Mechanics' Liens.

LIFE INSURANCE. See Insurance, 10-12.

LOCAL OPTION LAW. See Intoxicating Liquors.

MANDAMUS.

1. **APPEAL FROM ORDER GRANTING—STAY OF PROCEEDINGS—CONTEMPT IN DISOBEYING JUDGMENT.**—A judgment granting a peremptory writ of mandate to compel a city clerk to place the name of a candidate on the official ballot, is stayed upon the taking of an appeal from the judgment and the giving of an appeal bond in the sum of three hundred dollars, and an order thereafter made, adjudging the appellant guilty of contempt for disobedience of the judgment, is in excess

MANDAMUS (Continued).

of the jurisdiction of the court. (*Ballagh v. Superior Court of Kern County*, 149.)

2. **SPECIAL PROCEEDING—APPEALABLE ORDERS—STAY OF PROCEEDINGS.**—An application for such writ is a special proceeding, from the judgment in which an appeal lies, as provided in section 939 of the Code of Civil Procedure; and section 949 of that code provides in such case, it not being a case specified in sections 942 to 945, both inclusive, that the giving of the undertaking specified in section 941 stays proceedings in the court below upon the judgment. (*Id.*)
3. **APPLICATION FOR ALTERNATIVE WRIT TO STAY EXECUTION—NECESSITY OF NOTICE TO PARTIES INTERESTED.**—One who applies for an alternative writ of mandate to require a judge of the superior court to stay execution on a judgment must, under paragraph 4 of rule XXVI of the supreme court, furnish evidence that notice has been given to all parties interested that such application will be made, in order that they may have an opportunity to oppose the issuance of the writ. (*Kaiser v. Hancock*, 323.)
4. **UNLAWFUL DETAINER—STAY OF PROCEEDINGS PENDING APPEAL.**—There can be no stay of proceedings upon an appeal from a judgment of restitution in an action of unlawful detainer, unless the trial judge so directs, and in such case *mandamus* does not lie to compel him to order a stay, in the absence of an abuse of discretion on his part in refusing to make such order. (*Id.*)
5. **DISCRETION OF TRIAL COURT—ABUSE OF MUST CLEARLY APPEAR.**—Abuse of discretion by a trial judge will not be presumed, but must be made clearly to appear before his discretion will be interfered with on appeal. (*Id.*)

See *Intoxicating Liquors*, 13, 14; *Municipal Corporations*, 8; *New Trial*, 4; *Office and Officers*, 8; *Orphan Asylum*, 1; *Practice*, 1, 8; *State Land*, 3, 9.

MAP. See *Dedication*.

MARINE INSURANCE. See *Insurance*, 1-9.

MASTER AND SERVANT. See *Negligence*, 1-3.

MEASURE OF DAMAGES. See *Damages*.

MECHANICS' LIENS.

1. **NOTICE TO OWNER TO WITHHOLD PAYMENTS—ABANDONMENT OF WORK BY CONTRACTOR.**—Where one who has furnished materials to the contractor for the construction of a school building serves notice on the school district, after the contractor has abandoned work on the uncompleted building and at a time when he has received all pay-

MECHANICS' LIENS (Continued).

ments to which he is entitled, to withhold sufficient money to pay the claim of the materialman, the school district is not thereby in any way made liable to the materialman, under section 1184 of the Code of Civil Procedure. (*Dorris v. Alturas School District of Modoc County*, 30.)

2. **EFFECT OF NOTICE AS GARNISHMENT—EXTENT OF OWNER'S LIABILITY.**—Such notice has the effect of a garnishment of any money coming to the contractor which is in the hands of the owner, and the extent of the owner's liability to the materialman is measured by the owner's liability to the contractor. (*Id.*)

3. **FORECLOSURE OF MECHANICS' LIENS—CLAIM OF ABOGATION OF ORIGINAL CONTRACT BY EXECUTED ORAL CONTRACT—FAILURE OF EVIDENCE TO SHOW.**—In this action to foreclose certain mechanics' liens upon the real property of the defendant, it is held that the contention of plaintiffs that the original contract between the parties was abrogated by an executed parol agreement, providing for the erection of a different building, the cost of which, it was claimed, exceeded the sum of one thousand dollars and that, no memorandum of the latter contract being recorded or ever filed, judgment should have been directed to foreclose the liens upon the property for their full amount; and the further contention that the findings are contrary to the evidence, and inconsistent with, and repugnant to, each other, cannot be sustained. (*Eureka Mill and Lumber Company v. Andres*, 613.)

See Banks, 5; Surety, 4, 5.

MINES AND MINING. See Lease.

MISDEMEANOR. See Criminal Law, 3-6.

MISTAKE. See Vendor and Vendee, 1, 2.

MORTGAGE. See Banks, 4; Divorce, 3; Unlawful Detainer, 2, 3.

MUNICIPAL CORPORATIONS.

1. **PENSIONED POLICE OFFICER—RIGHT OF SURVIVING ADULT CHILDREN TO BENEFITS.**—Under subdivision 2 of section 96 of the charter of the city of Oakland, providing that upon the death of a service-pensioned police officer from "causes other than those specified in subdivision 1 of the section after ten years of service, then his widow, and if there be none, then his children, and if there be no widow or children, then his mother, if dependent upon him for support, shall be entitled to the sum of one thousand dollars," the adult children of such a decedent are not entitled to receive the amount named out of the police relief and pension fund. They are not "children" within the meaning of the charter provision. (*Mackey v. Mott*, 110.)

MUNICIPAL CORPORATIONS (Continued).

2. **PURPOSE OF POLICE PENSION ACT—PERSONS ENTITLED TO ITS BENEFITS.**—The term "children," as contained in such charter provision was not intended to be used in the larger sense of sons and daughters. It was not contemplated by the framers of the charter that provision should be made for grown sons and daughters; the purpose of the whole act was to provide for aged and infirm officers and certain necessitous relatives and minor children. (Id.)
3. **CHILDREN—MEANING OF TERM—WHETHER INCLUDES ADULTS.**—The meaning of the word "children" in its primary significance is generally understood to have reference to minor sons and daughters of a person, and in cases where the word has received a larger and more extended construction, it has been based upon the intention of the law-making power to so extend it. In such cases the construction of the term depends upon the context and surrounding circumstances. The word when used as expressive of relationship includes sons and daughters of whatever age, but when used in reference to age is confined to minors. (Id.)
4. **INTERPRETATION OF STATUTES—PURPOSE OF LEGISLATION.**—To arrive at the legislative intent in the interpretation of statutes, the original purpose and object of the legislation must be considered. (Id.)
5. **OPERATION OF WATER SYSTEM—PROPRIETARY OR SOVEREIGN CAPACITY.** Where a municipal corporation assumes, under its charter, the duty of operating a water system for the purpose of supplying its inhabitants with water, it acts, not in its sovereign capacity, but in the capacity of a private corporation engaged in like business. (*Nourse v. City of Los Angeles*, 384.)
6. **SUPPLY OF WATER—DUTY TO FURNISH WITHOUT DISCRIMINATION.**—In such case it is the duty of the city, like a private corporation, to furnish without discrimination to all its inhabitants who apply therefor a supply of water upon their compliance with such reasonable rules and regulations as it may lawfully establish for the conduct of the business. (Id.)
7. **RULES AND REGULATIONS—PAYMENT OF ARREARAGE OF FORMER OCCUPANT AS CONDITION PRECEDENT TO FURNISHING WATER.**—A rule adopted by the city that all water rates shall be charged against the property on which it is furnished, and against the owner thereof, and in case of delinquency the water shall be cut off and not turned on until the payment of the delinquency, irrespective of any change in the ownership or occupancy of the property, is unreasonable and discriminatory as against an occupant of property whose predecessors are in default but who has himself complied with all the regulations established as conditions precedent to the furnishing of water; there being no statute or charter provision conferring authority on the city to adopt such a regulation. (Id.)

MUNICIPAL CORPORATIONS (Continued).

8. **MANDAMUS—WHEN LIES TO COMPEL CITY TO FURNISH WATER.**—In such circumstances the applicant for water is entitled to a peremptory writ of *mandamus* to compel the city to supply him. (Id.)
9. **SCHOOL LAW—COMPENSATION OF SCHOOL DIRECTOR—CHARTER OF BERKELEY—CONSTITUTIONALITY OF SECTION 19, ARTICLE V.**—Section 19 of article V of the charter of the city of Berkeley, which provides that "each school director shall receive \$5.00 for each regular meeting of the board of education which he shall attend, provided that he shall not receive more than \$15.00 in any month," is not invalid under subdivision 2 of section 8½ of article XI of the constitution, as it existed prior to the amendment of October 1911, notwithstanding that such subdivision of the constitution, prior to such amendment, contained no express provision authorizing municipal corporations to provide in their charters for the payment of school director's salaries. (*Stern v. City Council of the City of Berkeley*, 685.)
10. **CITY CHARTERS—CONSTRUCTION.**—The provisions of city charters must be upheld unless they are clearly shown to have been at the time of their enactment repugnant to and inconsistent with the then fundamental law. (Id.)
11. **NATURE OF CITY CHARTERS—LAWS OF STATE.**—A city charter framed and adopted pursuant to constitutional provisions is not a law passed by a municipality, but is a law of the state, having the same force and effect as a law directly enacted by the legislature. (Id.)
12. **CONSTITUTIONAL LIMITATIONS—POWERS OF LEGISLATURE—CHARTERS.**—Our constitution is not a grant of power but rather a limitation upon the powers of the legislature; and it is competent for the legislature to exercise all powers not forbidden by the constitution of the state or delegated to the general government or prohibited by the constitution of the United States. Accordingly, it has been held that unless prohibited by some provision of the constitution, expressed or necessarily implied from its terms, a municipal charter adopted, as provided in article XI of the constitution, may contain any provision not in conflict with or covered by the general laws of the state. (Id.)
13. **GENERAL SCHOOL LAWS—CONFLICTING CHARTER PROVISIONS CONTROLLED BY.**—The acts passed by the legislature, in accordance with general provisions of the constitution, providing a general system of laws concerning the creation and conduct of common schools in this state, are controlling and conclusive over conflicting charter provisions; but the charter of a city or of a city and county may provide for matters not enumerated in the general laws and not in conflict therewith. The power of charters to so provide extends to all cases where the purpose of the provision is in furtherance of the purpose of the general laws of the state. (Id.)

MUNICIPAL CORPORATIONS (Continued).

14. **COMPENSATION OF SCHOOL DIRECTORS—CHARTER PROVISION REGULATING—NOT CONFLICTING WITH GENERAL LAWS.**—There is no general law with respect to the compensation to be paid to school directors or trustees; and the general laws relating to and regulating the state school system nowhere limit or deny the right of a municipality or of the legislative power acting through a freeholder's charter to make provision for the payment of salaries to school trustees or directors; and the provision of section 19 of article V of the charter of the city of Berkeley, providing for compensation of school directors, is valid, being obviously in furtherance of the school system adopted by the state and does not conflict with the general laws relating to and regulating the same. (Id.)
15. **SCHOOL DIRECTOR A MUNICIPAL OFFICER—COMPENSATION A MUNICIPAL AFFAIR.**—A school director of the city of Berkeley is a municipal officer, irrespective of whether or not the duties of the office are exacted by the charter or imposed by the general law of the state, and therefore the compensation to be paid him by the city out of the city treasury for services rendered the city in maintaining its school system as an integral part of the state school system is purely a municipal affair which is exclusively controlled by charter provisions. (Id.)
16. **CHARTER PROVIDING COMPENSATION OF SCHOOL DIRECTOR NOT SPECIAL LEGISLATION.**—The provision of the charter of the city of Berkeley providing for compensation of school directors is not a special law under subdivision 28 of section 25 of article IV of the constitution. (Id.)
17. **MUNICIPAL CHARTER—GENERAL LEGISLATION.**—Where a municipal charter as a whole is germane to the purpose of its creation, and its various sections are subordinate to and in harmony with the fundamental and statutory law of the state and affect all persons and things alike in the particulars provided for, the objection that such charter, or any provision thereof, is special legislation, cannot be successfully maintained. (Id.)

See Office and Officers.

MURDER AND MANSLAUGHTER. See Criminal Law, 91-129.

NEGLIGENCE.

1. **ACTION FOR DEATH OF STEVEDORE—COURSE OF EMPLOYMENT—ACCIDENT OCCURRING WITHIN.**—In this action to recover for the death of a stevedore, he having gone ashore for supper from the vessel on which he was working, and having, on his return to the vessel to resume work, been drowned by being precipitated into the sea through the breaking of the "traveler" connecting the vessel with the wharf, it is a fair inference from the evidence that his contract of service included the transportation to and from the vessel by means of the

NEGLIGENCE (Continued).

- "traveler," and that he was in the course of his employment when the accident occurred. (*Koskela v. Albion Lumber Company*, 12.)
2. **ACCIDENT TO EMPLOYEE—DOCTRINE OF RES IPSA LOQUITUR.**—There being no contention that the employee was at fault, and the evidence showing that the thing which caused the accident was under the exclusive control of the defendants, and that the accident was such as in the ordinary course of events would not have happened had the defendants used proper care, the rule of *res ipsa loquitur* applies a presumption of negligence arises against the defendants, and a motion for nonsuit is properly denied. (*Id.*)
 3. **RES IPSA LOQUITUR—MEANING OF RULE OR MAXIM.**—Under the rule of *res ipsa loquitur*, when a thing which caused an injury without fault of the injured person is shown to have been under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of explanation, that the injury arose from the defendant's want of care. (*Id.*)
 4. **JOINT LIABILITY OF OWNERS OF SHIP AND OWNERS OF LUMBER COMPANY FOR DEATH OF STEVEDORE.**—If the vessel was being loaded with lumber, and the lumber company had loaned the stevedore to the shipowners to assist in the loading, and the "traveler" was in part owned by the lumber company and in part by the owner of the ship, and was jointly operated by and for their joint benefit, both are liable for the death of the stevedore, in the absence of evidence tending to show that the accident happened by reason of the fault of one only of them. (*Id.*)
 5. **SPECIAL VERDICT—WHETHER NECESSITATES JUDGMENT FOR PLAINTIFF.**—The contention of the defendants in this case that the special verdict of the jury necessitates a judgment in their favor, inasmuch as it affirmatively appears therefrom that the plaintiff did not prove to the satisfaction of the jury that the defendants' negligence caused the stevedore's death, is not tenable. (*Id.*)
 6. **GENERAL VERDICT—EFFECT AS IMPORTING FINDING FOR PLAINTIFF.**—A general verdict for the plaintiff and against the defendants imports a finding in favor of the plaintiff on all the averments of the complaint material to his recovery. (*Id.*)
 7. **PRESUMPTIONS IN CASE OF GENERAL AND SPECIAL VERDICTS.**—All presumptions are in favor of a general verdict for the plaintiff, and it must control if a special verdict is not absolutely irreconcilable therewith. On the other hand, answers to interrogatories cannot be aided by intentment, as all intentments are in favor of the general verdict. (*Id.*)
 8. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.**—The trial court did not commit reversible error in this case in deny-

NEGLIGENCE (Continued).

- ing the defendants' motion for a new trial on the ground of newly discovered evidence; the granting or denying of the motion being within the sound discretion of the court, and its action not being ground for reversal except when such discretion is abused. (Id.)
9. **STREET RAILWAYS—OPERATION OF CAR NEAR TRUCK—INJURY TO PASSENGER ON STEPS.**—In this action against a street railway company by a passenger to recover for personal injuries sustained while riding on the steps of a car by coming in contact with a truck standing in close proximity to the track, the trial court was warranted in finding that the car was operated at an unsafe and dangerous speed, considering that the truck occupied a position so near the car as to be dangerous to occupants of certain parts thereof. (*Einertsen v. United Railroads of San Francisco*, 134.)
 10. **PASSENGER RIDING ON STEPS OF STREET CAR—INABILITY TO GET INSIDE BECAUSE OF CROWD ON STEPS.**—The evidence is sufficient to sustain the findings of the trial court that the defendant railroad company negligently permitted the platform and steps of the car where the plaintiff was standing to remain in a congested condition, so that he could not obtain access to the interior of the car and thereby escape being injured, and that the injuries sustained by him were not directly or proximately caused by his own negligence or by any want of care on his part, but were the result of the carelessness and neglect of the employees of the defendant. (Id.)
 11. **QUESTIONS OF FACT FOR TRIAL COURT.**—The questions as to whether or not the plaintiff exercised care to avoid the injuries, and whether the defendant was negligent in permitting the car steps to become congested, were questions of fact for the trial court. (Id.)
 12. **LOSS OF LEASED BARGE—SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS EXONERATING LESSEE.**—In this action by the lessor of a barge against the lessee to recover for its loss, the evidence is sufficient to support the findings that, at the time of the loss, the barge was being operated in a careful and proper manner by the defendant, that everything that human skill and agency could do to prevent the loss was being done by him, that the loss was entirely without his fault, and that it was occasioned by causes beyond human control. (*Oakland Barge and Lighter Company v. Foster*, 193.)
 13. **LEASE OF BARGE—DEGREE OF CARE EXACTED OF LESSEE.**—Such case presents a loss of property while in use under a compensated bailment, and therefore the defendant could be held liable for the loss only in the event that he failed to employ ordinary care and prudence in the use of the property. (Id.)
 14. **LOSS DURING UNUSUAL STORM—BURDEN OF PROOF AS TO NEGLIGENCE.**—If the defendant contends that the barge was lost as a result of a sudden, unusual, and extraordinary storm, the burden is upon him to establish such fact; and when he has done this, the burden shifts to the plaintiff to the extent of affirmatively showing

NEGLIGENCE (Continued).

that, notwithstanding the storm, the barge would not have been lost but for the defendant's negligence or his want of skill or care in operating it. (Id.)

15. **CONFLICTING EVIDENCE—CONCLUSIVENESS OF DECISION OF TRIAL COURT.**—If there is a substantial conflict in the evidence on this issue, the decision of the trial court based thereon will not be disturbed on appeal. (Id.)
16. **LOSS OF BARGE IN STORM—EVIDENCE OF EFFECT OF STORM ON OTHER VESSELS.**—On the issue whether the barge was lost through the negligence of the defendant or as the result of a storm, evidence of the effect of the storm upon other vessels similarly situated is relevant and material. (Id.)
17. **EXPERT EVIDENCE—HYPOTHETICAL QUESTIONS—NECESSARY BASIS.**—On such issue an objection that the facts stated in the hypothetical questions put to an expert witness are not sufficient in themselves to enable him to form and express an opinion as to the causes which produced the loss of the barge, goes to the weight of the evidence sought to be elicited by the questions rather than to the admissibility of such evidence, and is properly overruled. (Id.)
18. **HYPOTHETICAL QUESTIONS—UPON WHAT MUST BE FOUNDED.**—Hypothetical questions must always be founded upon admitted facts or other evidence in the case. (Id.)
19. **MOTION TO STRIKE OUT EVIDENCE—ABSENCE OF PREVIOUS OBJECTION.**—A motion to strike out evidence, if not preceded by any objection, will be overruled. (Id.)
20. **UNRELIABILITY OF TOW-BOATS OPERATED BY GASOLINE—STRIKING OUT OF EXPERT TESTIMONY REGARDING—HARMLESS ERROR.**—The striking out in such action of expert testimony as to the general unreliability of tow-boats operated by gasoline engines is harmless error, if no claim is made that the failure of such engines to work, while being used to tow the barge during the storm, contributed to the loss of the barge. (Id.)
21. **ORDINANCE REQUIRING HORSES TO BE HITCHED—TEAM BREAKING AWAY AND INJURING PERSON IN STREET—INSTRUCTIONS TO JURY.**—Where a driver leaves his team tied to a telephone pole in the street while he takes lunch, and the team runs away and injures the driver of another vehicle, there being an ordinance that no person shall leave any horse standing upon any of the public streets of the city unless the animal is in some way properly secured, either by hitching or being under the personal control of some person of suitable age, it is not necessarily misleading, in an action by the injured person to recover damages, to instruct the jury that if they believe from the evidence that in order properly to secure the defendant's team a strap or rope should have been passed through the bit and around the neck of one or both horses, the mere snapping

NEGLIGENCE (Continued).

of the hitching strap into the bit of one of them would constitute negligence, notwithstanding there is no evidence upon which to base the instruction, if the jury are also instructed at the request of the defendant upon the same subject, and the question of what constitutes the proper hitching of a horse is left for them to decide as a matter of common knowledge. (*Parkin v. Grayson-Owen Company*, 269.)

22. **PRECAUTIONS TAKEN BY DRIVER TO SECURE TEAM—OMISSION FROM INSTRUCTION.**—The instruction is not erroneous in omitting precautions taken by the driver to secure the team by setting the brake and wrapping the reins around it, before leaving the team, since the ordinance expressly provides that a horse must be "properly secured," either by being hitched or left in personal control of some person of suitable age. (*Id.*)
23. **INSTRUCTIONS AS TO MANNER OF HITCHING TEAMS—WHETHER CONFLICTING.**—Such instruction is not inconsistent with instructions given at the request of the defendant which in themselves are a correct and easily comprehended guide to the jury as to requirements of the ordinance in the manner of hitching teams. (*Id.*)
24. **INCONSISTENT INSTRUCTIONS—WHETHER PREJUDICIAL.**—Inconsistent instructions must be plainly misleading or confusing to make them prejudicial. (*Id.*)
25. **STRAP USED TO TIE TEAM—WHETHER FREE FROM DEFECTS—QUESTION FOR JURY.**—If in such action it is conceded that the way the driver secured the team was a reasonable and sufficient compliance with the ordinance, nevertheless the strap used therefor should have been free from defects that would weaken or make it unsafe; and the jury have the right to pass judgment upon this point and are not bound to accept the opinion of the driver that the strap was in his belief safe and sound. (*Id.*)
26. **COMMON-LAW DUTY OF DRIVERS — INSTRUCTIONS CONCERNING.**—Although the action is based on the violation of an ordinance requiring certain things to be done when a team is left standing in the streets, it is not prejudicial, though perhaps unnecessary, to give instructions as to the common-law duty of drivers in such circumstances. In a sense the ordinance is but a statement of a common-law principle. (*Id.*)
27. **FRIGHTENING OF TEAM BY FIRING PISTOL—WHETHER RELIEVES DRIVER FROM LIABILITY.**—If the horses were negligently hitched, the driver was liable for their running away and injuring the plaintiff, notwithstanding they were frightened by a boy firing a toy pistol. (*Id.*)
28. **PROXIMATE CAUSE—INTERVENING WRONGFUL ACT.**—The independent wrongful act, to constitute the proximate cause of displacing the original primary cause, must be so disconnected in time and nature

NEGLECT (Continued).

as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission. (Id.)

29. ACTION FOR DAMAGES—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER—ASSUMPTION OF RISK—NONSUIT.—In an action for damages for personal injuries sustained by the driver of a team while returning with a string of empty cars over defendant's tramway leading from its lumber yard to the tracks of a railway company, alleged to be due to the derailment of two cars from the defective condition of the track, the court properly sustained a motion for nonsuit upon the ground of plaintiff's own negligence, and also upon the ground that the condition of the track was one of the risks that plaintiff assumed, where it appears that plaintiff, from the time of the commencement of his employment to the moment of the accident, was perfectly familiar with the unsafe and insecure condition of the track and that the unsafe condition frequently recurred at the particular point where the accident happened, but notwithstanding this knowledge, continued in his employment, as plaintiff thereby assumed the risk which arose from the dangerous condition of the track. (Ford v. Weed Lumber Co., 702.)

30. REPAIR OF TRACK BY DEFENDANT—KNOWLEDGE OF PLAINTIFF—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.—In such a case plaintiff was not relieved from his assumption of the risk of his employment by the fact that he called attention to the particular defect in the track a few days before his injury, which the defendant undertook to repair, where plaintiff saw the repairs made and knew precisely their extent, and that they were but temporary and insufficient, and that the track at the particular point of the injury would, within a few days at most, become out of order, notwithstanding its present repair, and it further appearing that the place on the track where the derailment occurred was clearly within plaintiff's line of vision while he was hauling the cars along and over that portion of the track. His act in driving over the place where the accident occurred, without employing his faculties of vision, to see whether or not the track was in proper condition was in itself an act of negligence on his part contributing to his injury and sufficient to prevent a recovery. (Id.)

31. ACTION FOR DAMAGES—PERSONAL INJURIES—CONFLICTING EVIDENCE—FINDINGS CONCLUSIVE.—In this action for damages for personal injuries sustained by plaintiff as a result of a collision between his wagon, upon which he was riding at the time, and a street car of the defendant, it is held that the evidence sufficiently showed that the car at the time of the accident was proceeding at a more rapid rate down the hill toward the plaintiff in plain view and with only a limited area in which to turn aside and avoid the collision, than its operator should have gone, and hence that the finding of the trial

NEGLIGENCE (Continued).

court is justified by the proofs in the case; also that the evidence is sufficiently conflicting with respect to warning signals given or neglected to be given, to bring the case within the rule that the findings of the trial court thereon will not be disturbed on appeal. (*Arens v. United Railroads of San Francisco*, 714.)

32. **CONTRIBUTORY NEGLIGENCE.**—It is held in this action that the facts were almost exactly identical with those of the case of *O'Connor v. United Railroads of San Francisco*, 168 Cal. 43, and the law laid down by the supreme court in that case on the question of contributory negligence must be regarded as controlling. (*Id.*)

NEGOTIABLE INSTRUMENTS. See Promissory Notes.**NEW TRIAL.**

1. **MENTAL CONDITION OF ATTORNEY AS GROUND.**—A trial court does not err in denying the defendant a new trial on the ground that its attorney was afflicted with brain trouble at the time he prepared its answer, where it appears that, although the attorney died shortly afterward suffering from such malady, he exhibited his usual mental vigor in attending to other legal matters at the time of his alleged mental impairment. (*Allen v. Los Molinas Land Co.*, 206.)
2. **SETTLEMENT OF STATEMENT BY JUDGE WHO DID NOT TRY CASE—DISMISSAL OF APPEAL.**—An appeal from an order refusing a new trial will not be dismissed because the statement on the motion for the new trial was not signed by the judge before whom the cause was tried, notwithstanding he was not shown to have been without the state, or otherwise conditioned as is specified in the cases mentioned in section 653 of the Code of Civil Procedure. (*Lincoln v. Sibeck*, 331.)
3. **IRREGULARITY IN SETTLING STATEMENT—CONSIDERATION ON MOTION TO DISMISS APPEAL.**—The matter of the irregularity of proceedings occurring prior to the making of an order refusing a new trial, cannot be considered on a motion to dismiss the appeal from such order, although the same may constitute sufficient cause for affirming or reversing the order. (*Id.*)
4. **SETTLEMENT OF STATEMENT—MANDAMUS TO COMPEL.**—*Mandamus* lies to compel a trial judge to settle a statement of the case on a motion for a new trial, although no transcript is furnished him of so much of the evidence as is necessary to explain the specifications attached to the plaintiff's motion, where the proposed statement conflicts with the proposed amendments of the defendant. (*Johnson v. Works*, 363.)
5. **DUTY OF JUDGE TO ACT—SUFFICIENCY OF STATEMENT.**—It is the duty of the judge, in some form and to the best of his ability to remember what occurred at the trial, to settle the statement; but if the petitioner has not furnished a transcript of the testimony, and

NEW TRIAL (Continued).

a long time has elapsed since the trial, he cannot complain if the statement as approved is in more general terms with respect to the evidence contained therein than it would be if the exact terms of the testimony were embodied in a transcript. (Id.)

6. **GENERAL ORDER GRANTING—INSUFFICIENCY OF EVIDENCE—DISCRETION OF COURT—REVIEW BY APPELLATE COURT.**—When an order granting a new trial is general it is the well-settled rule that such order will not be reversed unless it appears that the order itself was an abuse of discretion. The granting or denying of a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon the appellate court, unless it appears that there has been an abuse of such discretion, and it is immaterial whether the evidence is insufficient to sustain all or only a portion of the issues on which the judgment depends. (Buckley v. County of Marin, 577.)
7. **CONTRACTS—CONSTRUCTION OF BRIDGE FOR COUNTY—PERFORMANCE—WHAT CONSTITUTES.**—Under a contract for the construction of a bridge for a county, in order for the contractor to recover, either on the contract or on *quantum meruit* for the reasonable value of the work and material, he must show a substantial performance and that he attempted in good faith to perform the contract. (Id.)
8. **ORDER GRANTING—SPECIAL VERDICT—MOTION FOR JUDGMENT ON—WHEN DISCRETION NOT ABUSED.**—Where the jury, in an action to recover for such work, found, from conflicting evidence, upon special issues, that the contractor did not "honestly" nor "in good faith endeavor to comply with the terms and conditions of said contract," and did not "complete said work substantially in accordance with the terms and conditions of said contract," but that the reasonable value of the services performed and material furnished were three thousand dollars, for which sum it rendered a general verdict in favor of the plaintiff, it was not an abuse of discretion for the trial court to grant plaintiff's motion for a new trial, and to deny defendant's motion for judgment in its favor on the special findings. (Id.)
9. **ORDER DENYING MOTION FOR JUDGMENT ON SPECIAL FINDINGS—RULE IN REVIEWING.**—In such a case, in denying defendant's motion for judgment in its favor on the first special finding, the court had the power to exercise its own judgment as to the sufficiency of the evidence to support such finding, and there being a substantial conflict in the evidence addressed to the issues by that finding determined, the rule applicable to the motion for a new trial is equally applicable to defendant's motion, and unless the appellate court can say that the trial court abused its discretion its action is conclusive on appeal. (Id.)
10. **CONDEMNATION OF LAND—RIGHT OF WAY—ORDER GRANTING—CONFLICTING EVIDENCE—DISCRETION OF COURT.**—When the evidence is

NEW TRIAL (Continued).

conflicting, the granting or refusing of a new trial rests peculiarly in the discretion of the trial court, and the appellate court will interfere only in cases of a plain abuse of such discretion, and the party alleging error must show the abuse of discretion. The same rule applies to condemnation proceedings as to other civil actions. (*Colusa and Hamilton Railroad Co. v. Glenn*, 634.)

11. **CONFLICTING EVIDENCE—LACK OF ABUSE OF DISCRETION.**—In this action to condemn certain land for a right of way, it is held that the evidence was irreconcilably conflicting, and that there was nothing to indicate that the court abused its discretion in granting the motion for a new trial. (*Id.*)
12. **GENERAL ORDER—CONFLICTING EVIDENCE—LACK OF ABUSE OF DISCRETION.**—In the absence of an apparent abuse of discretion, it is the rule that an order granting a new trial grounded upon insufficiency of the evidence is, in the presence of a substantial conflict in the evidence, conclusive upon the appellate court. (*Waltz v. Silveria*, 717.)

See Appeal, 13, 14, 22; Criminal Law, 136-139; Negligence, 8; Sale, 15.

NONSUIT.**GENERAL ORDER GRANTING—DISCUSSION OF COURT NOT CONSIDERED.**—

Where a trial court by its order grants a motion for a nonsuit in general terms it may not be contended on appeal that its order in granting the same is to be limited by the discussion in which the court indulged in the course of granting the order; and if it appears that the motion should have been granted upon either or both of the grounds upon which the same was made, the action of the trial court should be sustained on appeal. (*Ford v. Weed Lumber Company*, 702.)

NUISANCE. See Criminal Law, 4, 6.

OAKLAND, CITY OF. See Municipal Corporations, 1-4.

OFFICE AND OFFICERS.

1. **PUBLIC OFFICER—COMPENSATION OF CITY OFFICIAL A MUNICIPAL AFFAIR.**—The compensation of a municipal officer is purely a municipal affair, and the charter provisions of the municipality upon that subject are exclusive and conclusive. This is true whether the duties of the office are exacted by the charter or are imposed by the general law of the state. (*Milliken v. Meyers*, 510.)
2. **CITY DEPUTY SEALER OF WEIGHTS AND MEASURES—COMPENSATION—WHETHER FIXED BY CHARTER OR STATUTE.**—A city deputy sealer of weights and measures appointed prior to the adoption of the "Weights and Measures Act" (Stats. 1913, p. 1086), under an

OFFICE AND OFFICERS (Continued).

ordinance enacted by the city, which has a freeholders' charter empowering it to fix the compensation of all municipal officers, is entitled only to the compensation fixed by the ordinance, not that provided by the statute. (Id.)

3. WEIGHTS AND MEASURES ACT—PURPOSE AND INTERPRETATION.—

The Weights and Measures Act seeks to provide a uniform system for the regulation of the measurement and graduation of merchandise, manufactured articles and commodities sold and manufactured throughout the state. It provides for the appointment of a state sealer of weights and measures, makes it compulsory upon the board of supervisors of the various counties to appoint sealers of weights and measures or apply to the state sealer to assign deputies to them, and delegates to the legislative bodies of the various cities of the state the power, the exercise of which is optional, to appoint sealers of weights and measures for such municipalities. (Id.)

4. APPOINTMENT OF SEALERS—DELEGATION OF POWER TO CITIES.—

The delegation to a city of such power, to be exercised at its discretion, is the same as though the charter had in express terms made provision therefor, and it becomes a municipal affair to the extent "but the making of the appointment and the fixing of the official's compensation is a matter solely within the control and right of the municipality. (Id.)

5. PUBLIC OFFICER—PREVENTION OF PERFORMANCE OF DUTIES BY INJUNCTION—VACANCY IN OFFICE.—

A vacancy in the office of city sealer of weights and measures does not result, under subdivision 7 of section 996 of the Political Code, by his ceasing to perform all official duties for over three months, where, during that period, he is restrained from performing any official act by an injunction, and another action is pending in which the validity of the ordinance creating the office is upheld by the supreme court on appeal. The cessation of duties which will create a vacancy under the statute must be voluntary. (McEvers v. Boyle, 476.)

6. ABANDONMENT OF OFFICE—SURRENDER OF PARAPHERNALIA.—

The fact that, during the pendency of the injunction, such officer surrenders the paraphernalia of the office to the city on demand and on being informed that the city will no longer pay the rental of his office, does not show an abandonment of the office. Neither does a letter from the officer to the mayor, referring to the "re-establishment" of the office upon the dissolution of the injunction. (Id.)

7. VALIDITY OF ORDINANCE CREATING OFFICE—DETERMINATION BY COURT—FAILURE OF OFFICER TO RESUME DUTIES.—

The failure of the officer to take up the duties of his office as soon as the announcement of the decision by the supreme court in the case upholding the validity of the ordinance creating the office, does not show an intention on his part to consider the office vacant. (Id.)

OFFICE AND OFFICERS (Continued).

8. **MANDAMUS TO PAY SALARY—EXISTENCE OF FUND.**—In *mandamus* proceedings to compel the city auditor to issue warrants for the salary of such officer and his deputies for the restrained period, it is immaterial whether there are funds in the treasury applicable to the payment of the warrants. (Id.)
9. **SPECIFIC FUND FOR PAYMENT OF SALARY—MERGER IN GENERAL FUND.**—If money appropriated to pay such salaries has been merged in the general fund at the end of the fiscal year, it will be presumed that the specific fund still exists and is applicable to the payment of the warrants. (Id.)
10. **PUBLIC OFFICER—VACANCY IN OFFICE—PREVENTION OF PERFORMANCE OF DUTIES BY INJUNCTION.**—Judgment affirmed on the authority of *McEvers v. Boyle*, *ante*, p. 476. (Scott v. Boyle, 806.)

See Elections; Municipal Corporations, 1, 9-17.

ORDINANCE. See Intoxicating Liquors, 11-14; Negligence, 21-23.

ORPHAN ASYLUM.

1. **ALIEN PARENTS—SUPPORT OF CHILDREN—STATE AID—MANDAMUS.**—An orphan asylum is entitled to state aid, and may enforce it by *mandamus* against the state controller, for the support of a native-born orphan child of alien parents who have never become citizens but have resided in the state though not for at least three years prior to the application for aid, as provided by section 2289 of the Political Code. (*Sacramento Orphanage and Children's Home v. Chambers*, 536.)
2. **DISCRIMINATION AGAINST ALIENS—CONSTITUTIONAL LAW.**—The provision of section 2289 of the Political Code "that no child whose parent or parents have not resided in this state for at least three years prior to the application for aid, or whose parent or parents have not become citizens of the state, shall be deemed a minor orphan, half-orphan, or abandoned child within the intent and meaning of this chapter," is not in contravention of section 1 of amendment XIV of the constitution of the United States that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," but it is obnoxious to section 21 of article I of the constitution of California that no "citizen, or class of citizens, shall be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." (Id.)
3. **PRIVILEGES AND IMMUNITIES OF CITIZENS—FOURTEENTH AMENDMENT.**—The privileges and immunities of citizens of the United States, protected by the fourteenth amendment, are privileges and immunities arising out of the nature and essential character of the federal government, and granted or secured by the constitution. (Id.)

OFFICE AND OFFICERS (Continued).

4. **PRIVILEGES AND IMMUNITIES—DEFINITION OF TERMS.**—The word privilege, in common acceptation, means some immunity or advantage; it is a particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantage of other citizens. The words privileges and immunities are synonymous or nearly so. (Id.)
5. **STATE AID OF ORPHANS—WHETHER CONSIDERED AS CHARITY.**—State aid of orphan asylums, under section 2283 of the Political Code, is not to be regarded as a charity, or benevolent gift, but the fulfillment of a legal and moral obligation growing out of the duties and privileges of citizenship. (Id.)

PANDERING. See Criminal Law, 180-185.

PARENT AND CHILD.

1. **RELATIVE RIGHTS OF FATHER AND MOTHER—SECTION 197, CIVIL CODE.**
Where there is no evidence establishing any of the conditions under which the mother could deprive the father of the custody, services, and earnings of a minor child, under section 197 of the Civil Code, the father is entitled to its custody, and the mother has no right, in the absence of the father's consent, to transfer the custody, care, and services of the child to a stranger. (*Poetker v. Lowry*, 616.)
2. **OBLIGATION OF PARENT TO SUPPORT CHILD—CONTRACT OF PARENT NOT TO SURRENDER CHILD TO STRANGER ILLEGAL.**—The law imposes upon parents the duty of caring for, maintaining and supporting their children, and the agreement of the mother of a minor child not to surrender the child to a stranger, who desires to receive, care for, and maintain it, but to retain the custody and continue to care for and support the child herself, is not a legal consideration for a contract on the part of a stranger, who promises to pay the mother the reasonable value of such care and support, and enforcement of such an agreement would also contravene public policy. (Id.)
3. **PROCEEDING TO DECLARE CHILD ABANDONED—INSUFFICIENCY OF EVIDENCE TO SHOW.**—In a proceeding to have it determined that a minor child has been abandoned by its parents where the evidence, without dispute, showed that, fearful lest the delicate physical condition of the mother was such that she could not properly nourish her two infants born at the same time, the parents arranged with the sister of the father to take the custody and care of one of the infants, a girl; that the father, during the period that the child was with his sister and until the latter became ill and unable to bestow proper care upon the baby, paid the custodian of said child for the service of caring for it; that, after the sister became ill, the father sent to the persons who had taken charge of the child the sum of \$30.00 which, while intended to be

PARENT AND CHILD (Continued).

used for the benefit of the sick woman, was doubtless in part or perhaps in full payment of her services in caring for the infant; that the general tenor of the language of letters written by both the father and mother of the child to its custodians, after the latter had voluntarily taken the custody of the infant, clearly indicated an intention on the part of the parents to reimburse them for their services in looking after and attending to the welfare of the child; and that, as a matter of fact, the father agreed to compensate the custodians for their services to the child whenever he found himself financially able to do so, the court was not legally justified in declaring the minor to be an abandoned child within the meaning of section 224 of the Civil Code, providing that "any child deserted by both parents or left in the care or custody of another by its parent or parents," without any agreement or provision for its support, for a period of one year, is deemed to be an abandoned child. (Matter of Kelly, 651.)

4. SEVERING RELATION BETWEEN PARENT AND CHILD—STATUTE TO BE STRICTLY CONSTRUED.—A statute which authorizes a court upon a showing of the existence of certain designated facts or conditions, to make a decree or an order whereby the natural relation between parent and child is destroyed, must be strictly construed, and is, therefore, to be applied in those cases only in which the precise facts or conditions prescribed by such statute are shown to exist. (Id.)

5. ADOPTION—SECTION 224 CIVIL CODE TO BE STRICTLY CONSTRUED.—While the effect of an adjudication that a minor is an abandoned child, under the terms of section 224 of the Civil Code, is not to directly sever the relation of parent and child, still, since the result of such adjudication under said section is to enable a third party to adopt such child without first procuring the consent of its parents, thus practically depriving the parents of any voice in the matter of an adoption, in case a proceeding for that purpose be inaugurated, that section is also to be subjected to a strict construction when its application is invoked. (Id.)

6. FAILURE OF PARENTS TO SUPPORT CHILD—ABANDONMENT NOT SHOWN BY.—The mere failure of the parents of a minor child, in the custody and under the care of a third party, to contribute, while it is in such custody and care, to the support and maintenance of such child for a period of one year, does not itself constitute an abandonment of the minor within the purview of section 224 of the Civil Code. To constitute abandonment under said section of the code, it must appear by clear and indubitable evidence that there has been by the parents a giving up or total desertion of the minor. In other words, there must be shown an absolute relinquishment of the custody and control of the minor and thus the laying aside by the parents of all care for it. (Id.)

PARENT AND CHILD (Continued).

7. **ABANDONMENT—QUESTION OF INTENTION—EVIDENCE MUST BE CLEAR.**
Abandonment is a question of intention, which must be shown by a clear, unequivocal, and decisive act of the party—an act done that shows a determination not to have the benefit of the right to which he is entitled. (Id.)
4. **PROMISE OF FATHER TO COMPENSATE CUSTODIAN OF CHILD—AGREEMENT FOR SUPPORT—SECTION 224, CIVIL CODE.**—In such a case the promise by the father of the child that he would compensate, when able to do so, the custodian of the child for taking care of and supporting it, constitutes the "agreement or provision for its support," contemplated by section 224 of the Civil Code, and the fact that the father failed to keep said promise can prove nothing but a violation of the agreement. (Id.)
9. **ATTACHMENT OF CHILD AND CUSTODIAN FOR EACH OTHER—BETTER CIRCUMSTANCES OF CUSTODIAN THAN OF PARENTS NOT MATERIAL.**—The circumstance that the child and its custodians have formed a strong attachment for each other and that the custodians are better circumstanced than the parents for caring for the child, while perhaps more or less important in disposing of a guardianship proceeding, cannot enter into the determination of the question of adoption against the consent of the parents, or of a proceeding which, if sustained, would render it legally unnecessary to consult the desires or wishes of the parents in a proceeding looking to the adoption of their minor child by another. (Id.)

See Municipal Corporations, 1-4; Orphan Asylum.

PARTIES.

1. **SUBSTITUTION OF DEFENDANTS—PROCEDURE—JURISDICTION OF COURT.**
Where an action is brought against a bank to recover money to which adverse claims are made, and the bank pays the fund into court and applies to have the sheriff, who has levied an attachment on it, substituted as party defendant, accompanying the application with an affidavit setting forth the necessary facts for an order of substitution, the court has jurisdiction to make the order, although the bank previously had filed its answer but not before filing notice of the motion for substitution. (*Cassidy v. Norton*, 433.)
2. **ORDER SUBSTITUTING PARTIES—ERROR OF COURT—MANNER OF REVIEWING.**—The court in such case, having jurisdiction of the parties and of the subject matter of the action, has the legal right to decide the question of substitution, and if its decision is erroneous, the error cannot be corrected on *certiorari* but must be reached by an appeal from the final judgment in the case. (Id.)
3. **JOINDER OF PARTIES DEFENDANT—POWER OF COURT TO ORDER.**—In such case the trial court has jurisdiction, under section 389 of the

PARTIES (Continued).

Code of Civil Procedure, on motion of the sheriff, to have other claimants of the money joined as parties defendant. (Id.)

See Agency, 8; Assignment, 5; Quieting Title, 8, 9.

PARTITION. See Res Judicata.

PARTNERSHIP.

1. **DEALING BY PARTNER WITH THIRD PERSONS—ASSUMPTION OF GOOD FAITH.**—Where a partner is dealing with a third person respecting partnership money or property, the latter has the right to assume that the partner is acting in perfect good faith toward and with full authority from his copartners with regard to the transaction, and the fact that it may appear that the transaction, when consummated, will result solely to the benefit of the partner conducting it, constitutes no ground for an implication of fraud on his part toward the other partners in thus disposing of or handling the partnership assets. (*Breeze v. International Banking Co.*, 437.)
2. **PURCHASE AND SALE OF LANDS—ACTION FOR ACCOUNTING.**—In this action for an accounting of the dealings and transactions of an alleged partnership for the purpose of procuring options on, buying, selling, and dealing in a certain tract of land, the evidence introduced by the defendant justifies the finding that the plaintiff's assignor and the defendant did not enter into the contract of partnership described in the complaint, but that they did make an agreement concerning the sale of the land at the time a partnership is alleged to have been formed by them, which agreement the plaintiff failed to carry out, and that he was therefore not entitled to share with the defendant in the profits on the sale made by the latter. (*Reynolds v. Jackson*, 490.)
3. **AGREEMENT TO DIVIDE COMMISSIONS—EVIDENCE TO SUPPORT FINDING.**—There is also evidence to support that part of a finding which declares that the defendant agreed that, if the assignor of the plaintiff found a purchaser of the land referred to in the complaint, the defendant would divide the net commissions received by him. (Id.)
4. **AGREEMENT TO ACCOUNT FOR PROFITS—IMMATERIAL ISSUE—ABSENCE OF FINDING.**—In such action the omission to make a specific finding upon the alleged fact that the defendant agreed to account to the plaintiff's assignor for the profits realized from the sale of the land and to pay him one-half thereof, is immaterial, in view of the finding that the assignor neither sold nor procured a purchaser for the land or any part of it. (Id.)
5. **INCONSISTENCIES IN TESTIMONY—PROVINCE OF TRIAL AND APPELLATE COURTS.**—Discrepancies or inconsistencies in the defendant's testimony in such action are for the trial court to consider in connection with its consideration of his entire testimony and his de-

PARTNERSHIP (Continued).

meanor while testifying; and if it appears that the trial court believed and credited his testimony in the main, it is not for an appellate court to say that the discrepancies in his testimony, if in reality any there were, should be held to be of sufficient force or significance by way of impeachment to have required the court which heard and saw him testify to repudiate or disregard his testimony *in toto*. (Id.)

6. **WHAT CONSTITUTES—CO-OPERATION IN SALE OF MINING PROPERTIES—SINGLE VENTURE.**—Where two persons enter into an oral agreement to obtain an option on certain mining properties and sell them at a profit which is to be divided between them, their agreement constitutes a partnership although the object thereof is a single venture only. (Spencer v. Barnes, 189.)
7. **ACTION FOR ACCOUNTING—NECESSITY FOR DECREE DISSOLVING PARTNERSHIP.**—In an action between the parties to such an agreement for an accounting of the profits arising from sales, it is not necessary that the complaint should pray for, or that the court should decree a dissolution of the partnership, if it sufficiently appears from the pleadings that the purpose of the partnership has been fully accomplished prior to the suit. (Id.)
8. **PROFITS ILLEGALLY MADE—RIGHT OF INNOCENT PARTNER TO ACCOUNTING.**—If it appears in such action that the defendant has illegally obtained profits in the prosecution of the venture, the plaintiff may invoke the rule that an innocent member of a partnership, created for conducting a lawful business, is entitled to share in a profit which his partner has realized by misconduct in carrying on the business. (Id.)

See Claim and Delivery, 3; Fraud, 8.

PAYMENT. See Guaranty; Lease, 2.

PENSION. See Municipal Corporations, 1-4.

PHYSICIANS AND SURGEONS. See Criminal Law, 12.

PLACE OF TRIAL.

1. **VENUE—MOTION TO CHANGE TO COUNTY WHERE DEFENDANTS RESIDE—NOTICE OF MOTION—CURE OF DEFECTS.**—Where the notice of a motion to change the venue of an action to the county where the defendants reside is defective in stating the grounds of the motion, the defect is cured if the notice concludes with the statement that the motion will also be based on the demand and affidavit of merits, which documents show in full the moving ground. (Westover v. Bridgford, 548.)
2. **WAIVER OF DEFECTIVE NOTICE—APPEARANCE OF PLAINTIFF.**—But if the defect were not cured, the plaintiff, by appearing and contesting

PLACE OF TRIAL (Continued).

the motion without raising objection, will be deemed to have waived the defect. (Id.)

3. **AFFIDAVITS OF MERITS—SUFFICIENCY.**—An affidavit of merits on motion for a change of venue, which avers the facts of the case and leaves the question of whether or not the defendants have a meritorious defense based thereon to the consideration of the court, is sufficient. (Id.)
4. **VENUE AND JURAT OF AFFIDAVIT—VARIANCE—PRESUMPTION.**—Where an affidavit of merits has its venue laid in Siskiyou County and is sworn to before a notary public in the city and county of San Francisco, it will be presumed that the officer complied with the law and administered the oath within his jurisdiction. (Id.)
5. **CAPTION AND JURAT OF AFFIDAVIT—VARIANCE—PRESUMPTION.**—Where there is a variance between the caption and jurat of an affidavit, it will be presumed that the officer acted within his jurisdiction. (Id.)

See Criminal Law, 100, 101.

PLEADING.

1. **ACTION FOR GOODS SOLD AND DELIVERED—AMENDMENT OF COMPLAINT SO AS TO ADD ANOTHER COUNT.**—Where a complaint merely states an action for goods sold and delivered, an amendment thereof setting forth two causes of action, the first being identical with that pleaded in the original complaint, and the second alleging an account stated, that there was an error therein subsequently discovered amounting to the sum claimed to be due under the first cause of action, and praying for equitable relief and judgment for such sum, does not state a new and independent cause of action, since both causes of action have the same identical purpose. (Union Lumber Company v. J. W. Schouten & Company, 80.)
2. **AMENDMENT OF COMPLAINT—WHAT CONSTITUTES NEW CAUSE OF ACTION—TEST.**—A new count, offered under leave to amend, must be consistent with the former count or counts, that is, it must be of the like kind of action, and such as might have been originally joined with the others. It must be for the same cause of action, that is, the subject matter of the new count must be the same as the old; it must not be for an additional claim or demand, but only a variation of the form of demanding the same thing. (Id.)
3. **STATUTE OF LIMITATIONS—AMENDMENT OF COMPLAINT.**—Since both complaints in such case are for the recovery of the price of the same lot of goods, the action itself, irrespective of the theory on which the right to recover is based, must be regarded, so far as concerns the statute of limitations, as having been commenced when the original complaint was filed. (Id.)

PLEADING (Continued).

4. ACCOUNT STATED—OMISSION OF ITEM—ESTOPPEL.—If in such case the omission to include the amount sought to be recovered in the claim originally presented was due to an oversight and mistake, which was either mutual or suspected by the defendant, the account stated did not work an estoppel, and the court is warranted in surcharging the account. An account stated does not bar a recovery for items not within the contemplation of the parties when the settlement was made. (Id.)
5. FILING OF ANSWER AFTER DEMURRER OVERRULED—DISCRETION OF COURT—IMPOSITION OF TERMS—VALIDITY OF—SECTIONS 472 AND 473 CODE CIVIL PROCEDURE.—Under the provisions of sections 472 and 473 of the Code of Civil Procedure no question exists as to the power of the court, in the exercise of its discretion, to impose terms as a condition of answering after the expiration of the time given by law therefor; in the absence of an order granting leave so to do, defendants have no legal right to answer, and an order permitting an answer to be filed within a certain time after overruling of demurrer upon terms of payment of ten dollars to plaintiff or his attorneys by the defendants is valid. (Hayes v. Butler, 743.)
6. CONSTRUCTION OF SECTION 129 CODE CIVIL PROCEDURE—SECTIONS 472 AND 473 CODE CIVIL PROCEDURE NOT REPEALED BY.—The inhibition contained in section 129 of the Code of Civil Procedure is against the making of rules imposing a charge for the filing of a pleading *allowed by law*. An answer, after the expiration of the time fixed therefor, can only be filed by virtue of an order of court made in the exercise of the discretion vested in it by the provisions of sections 472 and 473 of the Code of Civil Procedure; hence, it is not a pleading the filing of which is *allowed by law* and therefor does not fall within the provisions of section 129, under which the court is empowered to make rules not inconsistent with the laws of this state. Sections 472 and 473 provide that the court may, in the exercise of its discretion and upon such terms as may be just, permit certain things to be done which *under the law* the party has no right as of course to do, and these sections are consistent with and are not repealed by section 129. (Id.)
7. RULES OF COURT—DISCRETION CANNOT BE TAKEN AWAY BY.—Courts cannot make an arbitrary rule applicable alike to all cases, whereby terms are imposed as a precedent condition of filing an answer after demurrer overruled and time allowed therefor by law has expired. To do so would be to divest themselves of the exercise of that discretion in each particular case which the law, in express terms, enjoins upon them. (Id.)
8. ORDER PERMITTING ANSWER UPON TERMS TO BE CONSIDERED IN ITS ENTIRETY—FAILURE TO MEET TERMS—DENIAL OF RIGHT.—Since the right of a defendant to answer, after the expiration of the time fixed therefor, is by virtue of an order made, such order must be

PLEADING (Continued).

construed in its entirety, and without compliance with the terms thereof it must be construed as an order of denial of the right to answer unless the condition imposed therein be complied with. (Id.)

9. **AMENDMENT OF PLEADING DURING TRIAL—DISCRETION OF TRIAL COURT—REVIEW ON APPEAL.**—The allowance or disallowance of an amendment in the midst of a trial is within the discretion of the trial court, and its ruling will not be disturbed on appeal unless such discretion has been abused. (*Allen v. Los Molinos Land Co.*, 206.)
10. **AMENDMENT OF ANSWER SO AS TO SHOW ABILITY TO FURNISH WATER—WHEN PROPERLY REFUSED.**—It is not an abuse of discretion in such an action for the court to refuse to permit the defendant, during the trial, to amend its answer by alleging that it could have put its ditches into condition to furnish the plaintiff with water if demand therefor had been made, where the complaint alleges that the defendant had not completed the canals and was not in a condition to deliver water and the answer does not deny the allegation. (Id.)
11. **NOTICE TO CORPORATION OF AVERMENTS OF COMPLAINT WHERE ITS OFFICER VERIFIES ANSWER.**—If the answer was verified by the superintendent of the defendant corporation, it is charged with notice of the averments of the complaint and cannot claim surprise at the trial when a case is made in accordance with the pleading. (Id.)

See Agency, 7-9; Architect; Assignment, 4; Attachment, 1; Brokers, 6; Corporations, 2, 3; Foreible Entry and Detainer; Judgment, 1; Lease, 1-6; Partnership, 7; Practice; Promissory Note; Specific Performance; Vendor and Vendee, 6, 8.

PLEDGE.

1. **CONSIGNED JEWELRY—AUTHORITY OF CONSIGNEE TO SELL—PLEDGE BY CONSIGNEE—VIOLATION OF TRUST—OWNER NOT ENTITLED TO RECOVER WITHOUT PAYMENT OF LOAN.**—Where a wholesale dealer or jobber delivers certain jewelry to a person in the retail jewelry business for the purpose of inspection by prospective customers of the latter, and authority is given the retailer to sell the same to his customers, if possible, at a price fixed by him, and in the event of such sale, he to pay the wholesaler the price agreed upon therefor, otherwise to return it, the transaction vests in the retailer apparent ownership of the property, and where the latter, instead of selling the goods and paying the wholesaler, as it was intended he should do, pledges them, in violation of his trust, for a loan to himself, the wholesaler is not entitled to recover possession of the property from the pledgee without first paying the amount for which it was pledged. (*Hambright & Walsh Co. v. Provident Pledge Corporation*, 600.)

PLEDGE (Continued).

2. **CASE WITHIN SECTION 2991 CIVIL CODE.**—Such a case comes within the provisions of section 2991 of the Civil Code, which provides that “one who has allowed another to assume apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business and for value.” (Id.)

See Corporations, 2.

POLICE COURT. See Criminal Law, 3-6.

POLICE OFFICER. See Municipal Corporations, 1-4.

POSSESSION. See Quieting Title.

PRACTICE.

1. **JUDGMENT—MANDAMUS TO COMPEL ENTRY OF DEFAULT—DEMURRER TO PETITION—ADMISSION.**—On demurrer to a petition for *mandamus* to compel a clerk of the superior court to enter the default of the defendant the allegations of the petition must be taken as true. (Davidson v. Graham, 484.)
2. **DEFAULT OF DEFENDANT—SAVING BY FILING OF DEMURRER.**—A demurrer filed by the defendant in an action on a bond is an appearance and an “answer” within the meaning of the provision of section 585 of the Code of Civil Procedure, that “if no answer has been filed with the clerk of the court, within the time specified in the summons or such other time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant.” (Id.)
3. **DEMURRER—NECESSITY OF DISPOSING OF BEFORE ENTRY OF JUDGMENT.**—It is irregular to enter a judgment against a defendant in whose behalf a demurrer has been filed, without disposing of the demurrer, and a judgment so entered will be reversed on appeal. (Id.)
4. **ENTRY OF DEFAULT—MANDAMUS TO COMPEL—WHEN DOES NOT LIE.**—Where a stipulation is on file “that no default shall be taken against the defendant, he waiving his demurrer,” and there is a doubt as to the right of the plaintiff to take a default and as to the duty of the clerk to enter it, the entry will not be compelled by *mandamus*. (Id.)
5. **CLERK WILL NOT BE COMPELLED TO PERFORM ACTS IN CONFLICT WITH COURT ORDERS.**—If the plaintiff has been refused an order by the trial court putting the defendant in default, an appellate court will hesitate to command the clerk to enter a default. The rule that a court will not compel parties to perform acts which will

PRACTICE (Continued).

subject them to punishment or put them in conflict with the order or writ of another court, applies where a clerk is asked to perform an act that will put them in conflict with a valid order made by the same court in the same action and upon the same matter. (Id.)

6. **TRIAL ON MERITS—POLICY OF LAW TO PERMIT.**—It is the policy of the law that every case should be tried upon its merits, and where it is sought to prevent this upon a showing which presents no circumstances of hardship to the party asking the relief, and the case is one where the right to the relief is doubtful, the parties should be remitted to a trial upon the merits. (Id.)

See Appeal; Bill of Exceptions; Costs; Evidence; Execution; Findings; Instructions; Intervention; Judgment; Mandamus; New Trial; Nonsuit; Parties; Place of Trial; Pleading; Summons.

PRINCIPAL AND AGENT. See Agency.

PROHIBITION. See Elections, 8.

PROMISSORY NOTE.

1. **ACTION ON PROMISSORY NOTE—PLEADING—NONPAYMENT—INSUFFICIENT ALLEGATION.**—In an action on a promissory note where the only allegation of the complaint which purports to aver nonpayment of the note is, "that said defendant has refused and still refuses to pay the same," the complaint fails to state a cause of action, which is not cured by the judgment, and a general demurrer to it should have been sustained. (Poetker v. Lowry, 616.)
2. **UNDUE INFLUENCE AND WANT OF CONSIDERATION—ACTION FOR CANCELLATION—SUFFICIENCY OF EVIDENCE.**—In this action for the cancellation of a promissory note which the plaintiff contends was executed without consideration and as the result of undue influence, and which the defendant contends was accepted by him as a compromise of his claim against the plaintiff for legal services rendered by him for her, the evidence is sufficient to support the general verdict in favor of the plaintiff on the issue of want of consideration, and any inquiry into the sufficiency of the evidence on the issue of undue influence therefore becomes unnecessary. (Cain v. French, 499.)

See Agency, 7, 10, 16, 17; Insurance, 10.

PUBLIC LAND. See State Land.

PUBLIC OFFICERS. See Office and Officers.

PUBLIC SERVICE CORPORATIONS. See Water and Water-rights.

QUANTUM MERUIT. See *Sale*, 16.

QUIETING TITLE.

1. **ENTRY UPON LAND SUPPOSED TO BE UNAPPROPRIATED.—SUBSEQUENT RECOGNITION OF OWNER.**—In this action to quiet title the evidence is sufficient to establish that the plaintiff, though he may have entered upon the property in question believing it to be no man's land, subsequently recognized that the defendant's testate was the owner thereof and thereafter occupied the premises in subordination to the rights of the testate, paying him a part of the annual crop as rental, and thereby creating the relation of landlord and tenant. (*Lummer v. Unruh*, 97.)
2. **RELATION OF LANDLORD AND TENANT—HOW CREATED—PRESUMPTION.**—A formal letting is not necessary to create the relation of landlord and tenant. After a person has entered upon land without right, the relation may arise by implication. A presumption in favor of the existence of the relation arises where a person in the possession of land pays rent to one claiming as owner. (*Id.*)
3. **ASSESSMENT OF LAND FOR TAXATION — SUFFICIENCY OF DESCRIPTION—EVIDENCE.**—If in such case an assessment of the property for purposes of taxation so designated the land that it would afford the owner a means of identification, and would not positively mislead him or would not be calculated to do so, the description is sufficient so that the return of the land for assessment and the payment of taxes thereon by the testate is admissible in evidence. (*Id.*)
4. **DEED — EXCEPTION IN GRANTING CLAUSE — EVIDENCE.**—Where a party claims under a deed describing a tract of land, the granting clause of which contains an exception, he must, if he relies upon the deed as establishing his title to land in controversy, show that the land claimed is not within the exception; otherwise the deed is ineffectual for the purposes offered. From the fact that certain lands within the exterior boundaries of the general clause contained in the deed were excepted from the operation thereof, it cannot be said, in the absence of proof, that the land in dispute is not within the exception. (*Id.*)
5. **EXCEPTION IN DEED—FORCE AND EFFECT.**—An exception in a grant is said to withdraw from its operation some part or parcel of the thing granted, which, but for the exception, would have passed to the grantee under the general description. The effect in such cases in respect to the thing excepted is as though it had never been included in the deed. (*Id.*)
6. **PRESUMPTION OF GRANT WITHIN PERIOD SHORT OF STATUTE OF LIMITATIONS.**—There is no absolute bar against the presumption of a grant, within a period short of the statute of limitations. (*Id.*)
7. **POSSESSION OF LAND—PRESUMPTION OF LAWFUL ORIGIN—EXCEPTIONS IN DEED.**—Upon the principle that when the possession and

QUIETING TITLE (Continued).

use of real property under a claim of right thereto have been long continued they create a presumption of lawful origin the court is justified, in this case, in indulging the presumption that the tract of land in dispute was not within the exceptions specified in the deeds, and, notwithstanding the failure of the defendants to make direct proof as to the land being without the exception, such fact, in the absence of any evidence to the contrary, will be presumed. (Id.)

8. **ACTION TO QUIET TITLE—PROCEEDINGS TO PUT IN POSSESSION—MATTERS DETERMINABLE.**—In proceedings to put in possession a defendant who has recovered judgment in an action to quiet title, the court cannot determine any proprietary rights of a person in possession of the property who was not a party to the action. (*Dresser v. Allen*, 124.)
9. **PERSON IN POSSESSION WHO IS NOT PARTY TO ACTION—PRESUMPTION AND BURDEN OF PROOF AS TO RIGHTS.**—If such person came into possession at any time after the commencement of the action, it is presumed that he came in under the plaintiff, and upon the issue pertaining to his right to remain in possession the burden is upon him to show affirmatively that his possession is rightful and under a title that has not been determined in the action, and that such possession was not taken by collusion with the plaintiff. (Id.)
10. **ABANDONMENT OR RELINQUISHMENT—WHETHER EFFECTUAL TO TRANSFER PROPERTY.**—Abandonment of property cannot be made in favor of a particular individual, nor as a means of transfer from one person to another. Relinquishment by one to another is not abandonment. (Id.)
11. **WRIT OF POSSESSION—OCCUPANT NOT PARTY TO ORIGINAL ACTION—WHETHER MAY RESIST.**—The enforcement of a judgment recovered in an action to quiet title cannot be resisted by a person not a party to the action, who asserts the right to retain the premises under a claim of possession adverse to the person against whom the judgment was awarded, when it appears that such claim is founded upon the mere declaration of the latter of an abandonment of the premises to the former and recognition of his claim without any actual removal from the premises. (Id.)
12. **ALIAS WRIT OF POSSESSION—WHEN LIES.**—In such a case the prevailing party is entitled to an *alias* writ of possession for the possession of the property. (Id.)

See Easement, 3.

RAILROAD. See Eminent Domain; Negligence, 9-11.

RAPE. See Criminal Law, 143-175.

RECORDATION. See Specific Performance, 4.

RESCISSION. See Vendor and Vendee.

RESISTING OFFICER. See Criminal Law, 176-178.

RES JUDICATA.

1. PARTITION—TITLE TO PROPERTIES INVOLVED—FORMER ADJUDICATION.

In this action for partition it is held that the title to the two pieces of property involved was adjudicated in the former case of *Lauricella v. Lauricella*, 161 Cal. 61, which was an action for the establishment and enforcement of a constructive trust, that is, for a decree declaring and adjudging the property here involved to be held in trust by the plaintiff herein for the benefit of her husband, during his life, and, upon his death, one-half thereof to be conveyed in equal shares to his father and mother, and the other one-half to be retained by her, absolutely; and that the judgment in such former action operates as an estoppel against any claim of the plaintiff for any further or greater interest in each of the two parcels of property than that awarded to her by such judgment. (*Giuffre v. Lauricella*, 422.)

2. RES JUDICATA—GENERAL RULES AND REASONS THEREFOR.—All matters in litigation which become the basis of a judgment are *res adjudicata*, and to permit causes of action or defenses once presented, considered and definitely determined to be again asserted in another or subsequent suit or action would be in violation of the principles underlying and supporting that salutary doctrine—a doctrine indispensably essential to any well-regulated system of jurisprudence, because the effect of its operation is to put an end to litigation, or to stop repeated trials of precisely the same question between the same parties. (*Id.*)

ROADS. See Streets, Roads, and Highways.

ROBBERY. See Criminal Law, 179-187.

RULES OF COURT. See Pleading, 7.

SALE.

1. CONSIDERATION FOR SALE—CANCELLATION OF ANTECEDENT DEBT.—

The cancellation of an antecedent debt, due the vendee from the vendor, for the sale of property, constitutes a valuable consideration. (*Breeze v. International Banking Corporation*, 437.)

2. SALE OF POTATO CRATES—DELIVERY TO THIRD PARTY—LIABILITY OF DEFENDANT—SUFFICIENCY OF EVIDENCE.—In this action to recover the purchase price of certain sweet potato crates alleged to have been sold to defendant, but which were delivered to one of the defendant's customers, who was present at the time the goods were ordered, it is held that the evidence is sufficient to support the finding

SALE (Continued).

of the trial court that the crates were sold to defendant, that it promised to pay for them, and upon such promise plaintiff relied in delivering the property. (*Klamath Lumber Company v. Co-operative Land & Trust Company*, 678.)

1. **EVIDENCE—ABSENCE OF WITNESS—ADMISSIBILITY OF EXPLANATION.** In such a case it was proper to show on the trial that the party to whom the crates were delivered was in Oregon in explanation of the fact that he was not called as a witness. (*Id.*)
4. **ERROR WITHOUT PREJUDICE—CONCLUSION OF WITNESS.**—In such a case, where a witness was asked "and as president of the corporation, as the manager of the plaintiff in this action, Mr. Routt, did you have any agreement with the defendant in this action in the year 1909?" while technically speaking, the question was probably objectionable, the answer was entirely without prejudice, where from the facts testified to by the witness, the conclusion necessarily followed that the agreement was with the defendant, and said testimony made it obvious that such was the opinion of the witness. (*Id.*)
5. **INSTRUCTIONS—STATEMENT OF NOTICE OF CASE—SALE AND DELIVERY.**—An instruction given in such a case at the request of plaintiff that, "plaintiff brings this action to obtain a judgment against defendant for the sum of \$600.00 alleged to be due plaintiff from defendant for the sale of 4,000 sweet potato crates for which plaintiff alleges defendant promised to pay; that defendant promised to pay it at the rate of fifteen cents per crate, no part of which sum plaintiff alleges has ever been paid," is not objectionable as it is proper for the court to state the nature of the action, and no sensible man would fail to understand that the term "sale" implied a "delivery" of the property, especially where there is no controversy as to the delivery of the crates, the only question being as to whom they were sold. (*Id.*)
6. **ORIGINAL OBLIGATION AND PRINCIPAL DEBTOR—SECTION 2794, CIVIL CODE.**—An instruction as to an original obligation and the principal debtor substantially in the language of section 2794 of the Civil Code in such a case is unobjectionable. (*Id.*)
7. **INSTRUCTIONS—THEORY OF CASE.**—It is well settled that either party has the right to have an instruction given to the jury based upon his theory of the case, if there is any evidence to support it. (*Id.*)
8. **INSTRUCTIONS—ORIGINAL PROMISE.**—In such a case, where the important issue in the case was whether the defendant was liable on an original promise or only on a conditional one, and the jury was fully instructed, at the request of the defendant, as to the distinction between a guaranty and an original promise, there was no error in an instruction that "if you are satisfied from all the evidence adduced in this case that the promise of defendant, if any

SALE (Continued).

was made, was an original promise to pay for the crates and not a conditional one, I charge you that it is your duty to find that fact in favor of plaintiff in this action." Such an instruction could hardly be understood as meaning otherwise than to find that the promise of defendant was "an original promise to pay for the crates," if the jury were satisfied from the evidence that an original promise was made by the defendant. (Id.)

9. **INSTRUCTION—FURNISHING CRATES TO THIRD PARTY—CONDITIONAL PROMISE.**—Where there was no dispute in such a case that the crates were "furnished" to the third party, and it was the contention of defendant throughout the trial not only that this was the fact, but that the third party alone was liable for the purchase price, the reference to such fact could not be prejudicial to the defendant in the following instruction: "The fact that the crates in question were furnished to Gutman by the plaintiff is not of itself absolutely sufficient to show conclusively that the promise of defendant, if any were made, was a conditional one." (Id.)
10. **PERSONAL PROPERTY—CONDITIONAL SALE—DESTRUCTION OF PROPERTY BY FIRE—WHEN LOSS FALLS UPON VENDOR.**—In the absence of an agreement to the contrary, the risk accompanies the title to personal property, and where there is a mere agreement to sell, and title therefor has not passed, the loss in case of destruction by fire falls upon the vendor. (Waltz v. Silveria, 717.)
11. **CONDITIONAL SALE OF PERSONAL PROPERTY—NOTES GIVEN—PURCHASE PRICE—FAILURE TO PAY—ELECTION OF REMEDIES—WAIVER.**—Upon the failure or refusal of the purchaser under a conditional sale of personal property to meet the payment of notes given under the contract for the purchase price, the vendor has two remedies: he may recover the possession of the property; or, waiving the conditions of the contract, consider the sale absolute, and sue for the balance of the purchase price as evidenced by the notes, but he cannot have both remedies; and where he elects to proceed against the purchaser for the purchase price he thereby exercises his option to treat the transaction as an absolute and completed sale and must be held to a waiver of an alternative condition of the contract to the effect that the purchaser will upon default of the payments provided for, or "in any event," return the property in good condition. (Id.)
12. **CONDITIONAL SALE OF FIREPROOF SAFE—DESTRUCTION BY FIRE—ACTION FOR BALANCE OF PURCHASE PRICE—GRANTING NONSUIT PROPER.**—In an action on promissory notes given for the balance of the purchase price on a conditional sale of a fireproof safe, where the contract provided that the title to the safe should remain in the vendor until the last of the promissory notes had been paid and that upon default in payment, the purchaser should return the safe to the seller in good order "in any event," where the evidence shows

SALE (Continued).

- without conflict that the building in which the safe had been placed by the purchaser was, without fault on his part, destroyed by fire, and that as a result of the fire, the safe, without fault on the part of the purchaser, was damaged to such an extent as to render it useless for the purpose for which it was intended, purchased, and used, the safe was destroyed within the meaning of the law, and the court properly granted a motion for nonsuit. (Id.)
13. **DESTRUCTION OF SAFE—SHOWING ON CROSS-EXAMINATION OF PLAINTIFF'S WITNESSES—NONSUIT.**—In such a case the fact that the destruction of the safe was developed in evidence upon cross-examination of plaintiff's witnesses did not lessen its value as evidence, nor preclude the trial court from considering it when passing upon the motion for nonsuit. (Id.)
14. **CROSS-COMPLAINT—CLAIM FOR DAMAGE TO GOODS IN SAFE—BREACH OF IMPLIED WARRANTY—PROPER GRANTING OF NEW TRIAL.**—In such a case, where it was not disputed that the safe was bought and sold as a fireproof safe for the express purpose of safeguarding a stock of jewelry and that the contents of the safe were damaged by the fire that destroyed it, the burden was on the cross-complainant to prove that the cross-defendant had knowledge of the existence of latent defects in the material and construction of the safe, and in the absence of such proof a verdict of the jury in favor of the cross-complainant cannot be sustained upon the theory that it was rightfully based upon proof of the breach of the implied warranty given to a purchaser of personal property by the provisions of sections 1767 and 1769 of the Civil Code, and the trial court properly granted a new trial on this issue. (Id.)
15. **WARRANTY OF FITNESS OF PROPERTY FOR PURPOSE INTENDED—CONFLICTING EVIDENCE—ORDER GRANTING NEW TRIAL CONCLUSIVE.**—While proof that the safe was destroyed and its contents damaged by fire in such a case was evidence that the safe was not absolutely fireproof, such evidence was neither controlling nor conclusive upon the issue as to whether or not the safe was reasonably fit for the purpose for which it was sold; and where expert witnesses for the cross-defendant testified in effect that the safe was reasonably fireproof, and that neither it nor any other so-called fireproof safe would undergo the fierce flames of an extraordinary fire such as occurred in the present case, without serious damage to the safe and its contents, the evidence was substantially conflicting upon the issue and an order granting a new trial will not be disturbed on appeal. (Id.)
16. **CONTRACTS—AGREEMENT TO SELL MILK—FAILURE OF PARTY TO SIGN CONTRACT—RIGHT TO RECOVER ON QUANTUM MERUIT—ERRONEOUS NONSUIT.**—Where parties orally agreed for the sale and purchase by them of a certain quantity of milk per day at a fixed price for a period of six months, and it was agreed that the contract should be

SALE (Continued).

reduced to writing and signed by the parties, but one of the parties never signed the contract, but delivered milk to the other for a certain period, in quantities specified in the contract, when for some reason undisclosed by the record, he refused to make further deliveries, the vendor was entitled to recover on *quantum meruit* the reasonable value of the milk delivered, and it was error for the court to grant a nonsuit. (Sam Aftargut Company v. Mulvihill, 784.)

17. **AGREEMENT TO REDUCE CONTRACT TO WRITING AND SIGN—FAILURE TO DO SO—CONTRACT INCOMPLETE—ESTOPPEL.**—In such a case, where it was the express intention of the parties that the contract should be reduced to writing and signed by them but this stipulation was not performed, the contract cannot be regarded as binding on either of the parties, especially where the proposed contract contained reciprocal covenants; nor was the vendor in such a case estopped from questioning the contract by reason of the fact that it was signed by the purchaser and left with brokers for the vendor's signature, where the evidence does not show that the brokers were any more the agents of the vendor than of the purchaser, they merely having brought the parties together, drew up the contract, and arranged that the purchaser was to sign it, and, sometime when convenient, they were to have the vendor sign it also. (Id.)
18. **CONTRACTS—SALE OF GRAPES—ACTION FOR BREACH OF CONTRACT—CONFLICTING EVIDENCE—FINDINGS CONCLUSIVE.**—In this action for damages for an alleged breach of a written contract for the sale and purchase of a crop of grapes, where, after the acceptance of a portion of the grapes, the defendant refused to receive the balance under the contract, it is held that, as the evidence is conflicting as to the conversation had between the parties and the circumstances and terms of defendant's refusal to receive any more grapes after the first shipment, the findings of the trial court thereon in favor of the plaintiff will not be disturbed on appeal. (Foote v. The San Francisco Produce Company, 787.)
19. **BREACH OF CONTRACT TO PURCHASE GRAPES—MEASURE OF DAMAGES—WHEN SECTIONS 3311 AND 3353, CIVIL CODE, NOT APPLICABLE.** In such a case, where the evidence sufficiently shows that the vendor did not have time to put into effect the method prescribed by sections 3311 and 3353 of the Civil Code of fixing the amount of his damages after it was definitely known that the purchaser would not abide by his contract and accept the grapes, before the remainder of his unpicked crop had been ruined by rain and frost, and that, after they were so ruined, they had no market value which could by any diligence or effort on the part of the vendor be ascertained, as provided in said sections of the code, the purchaser was not entitled to rely upon the aforesaid sections to defeat the vendor's claim for damages. (Id.)

See Agency, 1, 2; Brokers, 3; Vendor and Vendee.

SCHOOL DIRECTORS. See Municipal Corporations, 9-17.

SPECIFIC PERFORMANCE.

1. **CONTRACTS—PLEADING—SUFFICIENCY OF COMPLAINT—FAIRNESS OF CONTRACT.**—In a suit for specific performance of a contract for the purchase of certain land, the complaint is sufficient in its allegation that the contract is fair and equitable, and such as a court of equity will enforce, where it sets up *in loco verba* the contract itself, and states that the purchase price of the property stipulated in the contract was the fair and reasonable value of the property at the time the contract was made. (*Minaker v. Sunset Building & Real Estate Company*, 771.)
2. **SUFFICIENCY OF COMPLAINT—WAIVER OF TERMS OF CONTRACT AS TO PAYMENT.**—An objection to the allegation in the complaint in such a case that a strict compliance with that part of the contract requiring all payments of the purchase price to be made upon certain days and in certain amounts was duly waived, on the ground that it would cause a variation in the rule, and further that, since a contract in writing can only be modified by a contract in writing, the alleged waiver set forth in the complaint would be void, cannot be maintained, where it appears from the face of the complaint that whatever change in the contract was made in this respect, was a fully executed variation as between the original parties to the contract, and especially where, upon the face of the complaint, it does not appear as to whether the waiver of this particular provision of the contract was or was not in writing, the only allegation being that the terms of the contract in that respect were duly waived by the respective parties thereto. (*Id.*)
3. **MODIFICATION OF CONTRACT—PLEADING—ALLEGATION OF MODIFICATION—PRESUMPTION OF WRITING.**—Whenever it is necessary that a contract or modification of a contract shall be in writing, and the complaint alleges that the contract or modification of the contract was actually made and entered into between the parties, the presumption will be that the contract or modification was in writing, in the absence of an averment to the contrary. (*Id.*)
4. **CONTRACTS—PURCHASE OF LAND—RECORDATION—RIGHTS OF PURCHASER AS AGAINST SUBSEQUENT ENCUMBRANCES AND PURCHASERS—PAYMENTS TO ORIGINAL VENDOR—RIGHTS TO SPECIFIC PERFORMANCE.**—Where a contract for the purchase of land was duly recorded and thereafter and while the purchaser was proceeding to execute the same the seller made two deeds of trust to certain parties, and later one of the parties became the purchaser of the property upon the sale thereof under these deeds of trust, whatever rights the latter or his successors in interest obtained by virtue of the deeds of trust or by the sale of the property thereunder were taken subject to the contract made with the purchaser; and the purchaser was entitled to continue to make his payments under

SPECIFIC PERFORMANCE (Continued).

his original contract to the original vendor instead of to the purchaser under the deeds of trust, in the absence of definite notice of the transfer of title, and when he has made full payment to the original vendor he is entitled to demand specific performance of the contract not only from the original vendor, but from all those that succeeded in interest with notice of his contract. (Id.)

STATE LAND.

1. **RESURVEY OF THIRTY-SIXTH SECTION SO AS TO CHANGE ORIGINAL BOUNDARIES.**—Where on an official resurvey of the thirty-sixth section of a township the boundaries are changed so as to include land not embraced by the lines of the section as originally surveyed, the land thus included becomes a part of the school lands of the state and open to purchase under its laws. (*Jordan v. Kingsbury*, 166.)
2. **BOUNDARIES BETWEEN STATE AND FEDERAL LANDS—CONFUSION IN AS GROUND FOR REFUSAL OF MANDAMUS.**—A writ of mandate to compel the surveyor-general to approve an application to purchase such land will not be denied on the ground that the granting of the writ will create confusion between the state and federal governments as to the boundaries of their respective lands. (Id.)
3. **APPLICATION TO PURCHASE—ACTS OF SURVEYOR-GENERAL MINISTERIAL—MANDAMUS.**—The power of the surveyor-general, upon an application to purchase state lands, is neither judicial nor unlimited, under section 3498 of the Political Code, but merely ministerial, and he is subject to the compulsion of a writ of mandate. (Id.)
4. **WITHDRAWAL FROM SALE AFTER FILING OF APPLICATIONS TO PURCHASE.**—The state has power to withdraw lands from sale after the filing but prior to the approval of applications to purchase and the payment of the first installment of the purchase price. (*Hooper v. Kingsbury*, 192.)
5. **APPLICATION TO PURCHASE—PURPOSE AND EFFECT OF DEPOSIT AND RECEIPT THEREFOR.**—The deposit required by statute from an applicant for the purchase of state land is intended to be nothing more than a mere conditional deposit, and the receipt to be given therefor does not become a part of the purchase price, and cannot be accepted as such, before the application to purchase has been approved. (*Ayers v. Kingsbury*, 183.)
6. **PROCEEDINGS TO PURCHASE LAND—STATUS OF PURCHASER DURING PENDENCY—WHEN RIGHTS BECOME IRREVOCABLE.**—Pending the preliminary proceedings prescribed for the purchase of public lands, the state recognizes no absolute right in the applicant, and does not enter into a contract of purchase and sale with him until the payment of the first installment of the purchase price; that is to say, not until the applicant receives a certificate of approval under section 3498 of the Political Code, and has taken it to the county treasurer and made the first payment of twenty per cent of the

STATE LAND (Continued).

purchase price, does the state recognize any irrevocable right in the applicant. When this has been done, then the state closes a contract of purchase and sale, and evidences it by the issuance of a certificate of purchase, showing the class of lands purchased, etc. (Id.)

7. **WITHDRAWAL OF LAND FROM SALE—EFFECT OF PENDING APPLICATION TO PURCHASE.**—The withdrawal of public lands from sale prior to approval of the applications to purchase, and the payment in whole or in part of the purchase price, finally and effectually ends all preliminary proceedings instituted for the purchase of the lands. (Id.)

8. **COMPLIANCE BY PURCHASER WITH PRELIMINARY REQUIREMENTS—EXTENT OF RESULTING RIGHTS.**—The mere compliance of applicants to purchase state lands with the requirements of the law relating to the making and filing of applications therefor, secures to them nothing more than the privilege of becoming the exclusive purchasers of the lands applied for in the event that the state does not withdraw them from sale before the contract of purchase is completed by the approval of the application and the payment of the first installment of the purchase price. (Id.)

9. **WITHDRAWAL OF SCHOOL LAND—MANDAMUS TO COMPEL SURVEYOR-GENERAL TO ACT ON PENDING APPLICATIONS TO PURCHASE.**—*Mandamus* does not lie to compel the surveyor-general to file applications to purchase from the state as school lands certain sixteenth and thirty-sixth sections, although at the time the applications were presented the lands were open for sale, if subsequently to such presentation and prior to the expiration of the time for the approval of the applications by the surveyor-general, the state by legislative enactment withdrew the lands from sale and expressly prohibited the surveyor-general from receiving or filing any applications to purchase them. (Id.)

10. **APPLICATION TO PURCHASE—WITHDRAWAL FROM SALE.**—Judgment affirmed on the authority of *Ayres v. Kingsbury*, ante, p. 183. (Parker v. Kingsbury, 803.)

STATUTES. See Fish and Game Law; Intoxicating Liquors.

STATUTE OF LIMITATIONS. See Pleading, 3; Quieting Title, 6.

STAY OF PROCEEDINGS. See Mandamus.

STOCK AND STOCKHOLDERS. See Banks; Corporations; Summons, 2, 3.

STREETS, ROADS, AND HIGHWAYS. See Dedication; Easement.

SUMMONS.

1. **ACTION—MOTION TO DISMISS FOR DELAY IN SERVING SUMMONS—SPECIAL APPEARANCE.**—The mere making and presentation of a motion to dismiss an action upon the ground of unreasonable delay in the service of summons is not a general appearance of the defendant which subjects him to the jurisdiction of the court for all of the purposes of the action. (*Anderson v. Nawa*, 151.)
2. **ENFORCEMENT OF LIABILITY OF STOCKHOLDERS OF BANK—ACTION BY BANK COMMISSIONER—DISMISSAL FOR DELAY IN SERVING SUMMONS.**—It is not an abuse of discretion to dismiss an action, brought by the bank commissioner against the stockholders of an insolvent banking corporation on behalf of its creditors, for a delay of two years and ten months in serving summons on the moving defendant, where it appears that the summons could have been served at all times without any difficulty, although it is made to appear in opposition to the motion that during all of such period the plaintiff was actively engaged in an investigation of the bank's assets, which, if successful, would thereby reduce the defendant's liability as stockholder. (*Id.*)
3. **INABILITY TO SERVE SOME OF DEFENDANTS NO EXCUSE FOR NOT SERVING OTHERS.**—The difficulty of locating some of the defendants in such an action is not a sufficient excuse for delay in the service of process upon a defendant whose whereabouts is known. The liability of such defendant as a stockholder is primary and independent, and in no sense and to no extent dependent or contingent upon the liability of the remaining defendants, and the court in its discretion might render a several judgment against him without regard to the liability of the remaining defendants, and regardless of whether or not any or all of them have been served with process. (*Id.*)
4. **ABSENCE OF INJURY TO DEFENDANT NO EXCUSE FOR DELAY IN SERVING SUMMONS.**—The fact that the delay in the service of summons did not operate to deprive the defendant of any defense which he may have had to the action will not suffice to excuse such delay. (*Id.*)
5. **MERITS OF CASE—WHETHER CONSIDERED ON MOTION TO DISMISS ACTION FOR DELAY IN SERVING SUMMONS.**—The dismissal of an action because of unreasonable delay in the service of summons may be made without regard to the merits or demerits of the cause of action; the motion is granted as to a meritorious cause of action as well as to one without merit, because in either case there has been a failure upon the part of the plaintiff to use the diligence which the law requires to make an end of litigation. (*Id.*)
6. **DELAY IN SERVICE OF SUMMONS—RULE THAT LACHES CANNOT BE IMPUTED TO STATE**—The state bank commissioner, in his action to enforce the liability of stockholders of an insolvent bank on behalf

SUMMONS (Continued).

of its creditors, is not invested with the sovereignty of the state, and cannot, on motion by a defendant to dismiss the action for delay in serving summons, invoke the rule that laches cannot be imputed to the state. (Id.)

7. **APPEAL—APPEALABLE ORDER OR JUDGMENT—WHETHER APPEAL LIES FROM ORDER REFUSING TO VACATE.**—Generally the party aggrieved by a judgment or an order must take his appeal from the judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside. (*Altpeter v. Postal Telegraph-Cable Company*, 255.)
8. **RELIEF IN EQUITY FROM JUDGMENT AFTER EXPIRATION OF TIME TO APPEAL.**—The aggrieved party to a judgment ordinarily must appeal to equity in the form of an independent suit for that purpose, where, the time within which he might have appealed therefrom having passed, he desires to set it aside for reasons extrinsic or collateral to the questions examined and determined in the action. (Id.)
9. **EXCEPTIONS TO RULES—SECTION 473 OF THE CODE OF CIVIL PROCEDURE.**—But there are exceptions to these rules, and the legislature has seen fit to make provision for the application of some of these exceptions in section 473 of the Code of Civil Procedure. (Id.)
10. **FAILURE TO SERVE SUMMONS—RIGHT OF DEFENDANT TO VACATE JUDGMENT AND FILE ANSWER.**—The provision of such section permitting the defendant to answer where personal service of summons has not been had, necessarily presupposes the right in the party to the action upon whom personal service of summons has not been had to have the judgment set aside preliminarily to the filing of the answer. (Id.)
11. **SERVICE OF SUMMONS ON WRONG CORPORATION—RIGHT OF CORPORATION NOT SERVED TO HAVE JUDGMENT VACATED ON MOTION.**—Under the provision of section 473 of the Code of Civil Procedure that "when from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action," a defendant corporation which was not served with summons, service having been made instead upon a foreign corporation by the same name, and hence which did not defend or appear, may, six months after it might have appealed from the judgment, move to set it aside. (Id.)
12. **SECTION 473 OF THE CODE OF CIVIL PROCEDURE—CUMULATIVE REMEDY.**—Such provision of the Code of Civil Procedure does not contemplate a new or an independent suit in equity to set aside the judgment in order to enable the defendant to answer to the merits; it is intended as a distinct remedy from and cumulative to that which may be had in a court of equity to annul a judgment, the time for appealing from which has passed. (Id.)

SUMMONS (Continued).

13. **CONSTRUCTIVE SERVICE—WHETHER CODE PROVISION CONFINED TO CASES OF.**—The application of such code provision is not confined to cases where constructive service has been had and a default judgment thereupon entered. (Id.)

See Banks, 1-3.

SUPERIOR COURT. See Appeal, 19, 20; Criminal Law, 5, 177.

SURETY.

1. **CONSTRUCTION CONTRACT—FAILURE TO RECORD—EFFECT ON LIABILITY OF SURETY OF CONTRACTOR.**—The fact that a construction contract is invalid as between the parties because not recorded as required by section 1183 of the Code of Civil Procedure, does not release the surety on the bond of the contractor from liability. (Watterson v. The Owens River Canal Company, 247.)
2. **CHANGE IN CONTRACT—WHETHER DISCHARGES SURETY.**—A change made in such contract, without the consent of the surety, releases him; but this rule would not apply to a change effected by corporate officers without authority, nor to a change orally agreed upon but not actually executed. (Id.)
3. **ABANDONMENT OF WORK BY CONTRACTOR—COMPLETION OF BUILDING BY SURETY—ESTOPPEL TO OBJECT TO CHANGES.**—If the contractor abandons work under such construction contract, and his surety, without objection, completes the contract in accordance with changes therein made and demands and receives payment therefor, the surety cannot successfully maintain that the changes were outside the terms of the written contract, or that they were made without his consent. (Id.)
4. **RIGHTS OF SURETY ON COMPLETION OF CONTRACT—COMPENSATION AND LIEN.**—In completing the work under the unrecorded contract the surety stands in the place of his principal, the contractor, and hence is not entitled to a lien, under section 1183 of the Code of Civil Procedure, for the value of anything furnished or done, but he is limited in his recovery, as in like circumstances the contractor would be, by the contract price named in the written agreement, after adjustment of all additions and deductions due to changes in the work as it progressed, and also after allowance of the proper credits for payments made by the owner. (Id.)
5. **SUBCONTRACTORS—RIGHT TO LIEN WHERE PRINCIPAL CONTRACT NOT RECORDED.**—Although the contractor or his surety are not entitled to a lien under such unrecorded contract, subcontractors are entitled to liens for labor performed and materials furnished. (Id.)
6. **LIABILITY ON ASSUMING PERFORMANCE OF PRINCIPAL'S CONTRACT.**—When a surety, in pursuance of the terms or an undertaking, assumes the performance of the principal's contract, he must,

SURETY (Continued).

by being subrogated to the rights of the principal thereunder, necessarily become subject to all of his liabilities. (Id.)

TAXATION. See Quieting Title, 3.**TENANTS IN COMMON.**

1. **JUDICIAL SALE OF INTEREST IN REAL PROPERTY—RIGHT OF COTENANT TO PURCHASE.**—While the law prohibits a tenant in common from purchasing for his own benefit an outstanding encumbrance upon the common property, this rule has no application to the purchase by a tenant in common of his cotenant's interest in real property at a judicial sale. (*Westergreen v. Beer*, 775.)
2. **JUDICIAL SALE—SALE BY GUARDIAN OF WARD'S INTEREST AS TENANT IN COMMON OF REAL PROPERTY—RIGHT OF COTENANT TO PURCHASE.**—A sale made by the guardian of minors under order of court of the interest of the minors as tenants in common of certain real property, is a judicial sale at which the minors' cotenants are entitled to purchase the property in the absence of fraud. (Id.)
3. **ACTION TO ESTABLISH TRUST—PURCHASE OF MINOR'S INTEREST IN REAL PROPERTY BY COTENANT—WHEN TRUST NOT ESTABLISHED—PLEADING.**—Where certain real property was distributed to the four children of the deceased jointly under her will, two of which children were minors, and thereafter the guardian of the minors, pursuant to an order of the superior court, sold the interest of the minors in the property which was bought by one of the adult sisters of the minors, an action by the minors to establish a trust in their favor against the sister who purchased the property and to compel a reconveyance thereof upon the theory that the adult sister, being a tenant in common with the minors, was prohibited from purchasing their interest in the property, cannot be maintained, in the absence of any showing of fraud, undue influence, collusion, inadequacy of consideration or any other fact tending to show that the adult sister took advantage of her situation with reference to the property or her relationship to the minors, and a demurrer to the complaint in such a case was properly sustained. (Id.)
4. **BROTHERS AND SISTERS NOT IN FIDUCIARY RELATIONSHIP.**—The mere relationship of sister and brother standing alone and by itself does not create a fiduciary relationship. (Id.)

TENDER. See Claim and Delivery, 3, 4.**TIME, COMPUTATION OF. See Intoxicating Liquors, 1-3.****TRUSTS. See Banks, 5.**

UNLAWFUL DETAINER.

1. **POSSESSORY ACTION—CANNOT BE DEFEATED BY FACT OF SECURITY GIVEN FOR RENT.**—Unlawful detainer is primarily a possessory action, which cannot be defeated or delayed by the fact that the landlord has taken security for his rent, without destroying the manifest design of the legislature (Code Civ. Proc., sec. 1161) to provide a summary remedy for the recovery of the possession of the premises withheld by a tenant in violation of the covenants of a lease or other agreement. (*Toplitz v. Standard Co.*, 575.)
2. **DAMAGES RECOVERABLE INCIDENTALLY—ACTION NOT FOR RECOVERY OF MONEY—MORTGAGE TO SECURE RENT NO BAR.**—Incidentally a judgment for the plaintiff in an action of unlawful detainer may award such actual damages as may have been occasioned by a withholding over after a breach of the covenants of the lease; and in addition may, if the circumstances of the case justify it, award to the plaintiff by way of punitive damages a sum equal to treble the amount of the rent then due; but in no sense is an action of unlawful detainer one for the recovery of a debt or the enforcement of a right secured by a mortgage given for security of the rent reserved in the lease under which the premises are held, and therefore the existence of such mortgage cannot be pleaded as a bar to the action, under the provisions of section 726 of the Code of Civil Procedure. (*Id.*)
3. **FINDING AS TO MORTGAGE IMMATERIAL—WHEN PLAINTIFFS ENTITLED TO JUDGMENT ON APPEAL.**—In an action of unlawful detainer, where the trial court found, in substantial accord with the admitted allegations of the complaint, in favor of the plaintiffs in so far as concerned the execution of the lease and the breach of the covenant to pay the rent reserved, but further found that a mortgage given as security for the rent had not been resorted to and exhausted prior to the institution of the action, and from the latter finding deduced the conclusion of law "that by reason of the provisions of section 726 of the Code of Civil Procedure" the action is barred, the existence of the mortgage being no defense, the finding in relation thereto is immaterial, and the judgment should have been for plaintiffs, and will be so ordered on appeal. (*Id.*)

See *Mandamus*, 4.

VENDOR AND VENDEE.

1. **MISTAKE AS TO LAND PURCHASED—RESCISSION BY VENDEE.**—Where intending purchasers of city property visit the premises with the vendor's agent and indicate to him the particular parcel they will purchase and also land they will not purchase, and, upon his mistaken statement that the property they desire is lot number 35, they purchase the lot bearing that number when as a matter of fact such lot embraces a portion of the tract which they have specifically

VENDOR AND VENDEE (Continued).

- rejected, they are entitled to rescind their purchase. (*Taber v. Piedmont Heights Building Company*, 222.)
2. **SPECULATIVE CONTRACT—EFFECT OF MISTAKE.**—In such case the rule does not apply that where parties knowingly enter into a speculative contract or transaction, one in which they intentionally speculate as to the result, and there is an absence of bad faith, violation of confidence, misrepresentation, concealment, or other inequitable conduct, the contract is binding, notwithstanding the mistake of one of the parties. (*Id.*)
 3. **RISK OF CONTRACT TURNING OUT IN CERTAIN WAY—RELIEF AGAINST EVENT.**—Nor does the rule apply that where each of the parties to a contract is content to take the risk of its turning out in a particular way, chancery will not relieve against the event. (*Id.*)
 4. **RESCISSION BY VENDEE—INTEREST—FROM WHAT TIME TO BE COMPUTED.**—In an action by such vendees for rescission on the ground of mutual mistake, interest should be allowed only from the date of rescission, there being no allegation of fraud or willful misrepresentation. (*Id.*)
 5. **RESCISSION BY VENDOR—ACTION BY VENDEE TO RECOVER MONEY PAID—PAROL EVIDENCE OF WAIVER AND ESTOPPEL.**—Where the vendees under a contract to purchase real estate bring an action to recover the money they have paid, on the ground that the vendor has rescinded the contract, they may introduce parol evidence to show a waiver by the vendor of performance of certain provisions of the contract and an estoppel against his claim of forfeiture. (*Seals v. Davis*, 68.)
 6. **PLEADING—COMPLAINTS STATING TWO CAUSES OF ACTION—FINDINGS.**—If in such action the complaint contains two counts, the first alleging that the plaintiffs have performed all the obligations on their part under the contract and that the defendant has sold the property to a third person without any default on their part, and the second in the form of a common count for money had and received, the question whether a finding that the averments of the first count are true is supported by the evidence becomes immaterial in the presence of proofs of the second cause of action. (*Id.*)
 7. **RESCISSION OF CONTRACT—ACTION FOR MONEY HAD AND RECEIVED.**—When a vendee seeks to recover money he has paid upon a contract of sale which the vendor has attempted to rescind, he may accept such rescission, and bring his action in the form of the common count for money had and received by the vendor to his use and benefit. (*Id.*)
 8. **WAIVER AND ESTOPPEL—PLEADING AND PROOFS.**—In such an action the plaintiff is not bound to anticipate the defendant's plea of his right to work a rescission of the contract, with the resultant right of forfeiture of the payments which were made under its terms,

VENDOR AND VENDEE (Continued).

based upon the plaintiff's failure to perform certain of its conditions, and to plead in advance of these affirmative defenses matter of waiver or estoppel; but the plaintiff may rely upon the replications which the code makes for him, and proffer his proof of waiver or estoppel upon the trial of the case. (Id.)

9. **ESTOPPEL OF VENDOR—SUFFICIENCY OF EVIDENCE—MATERIALITY OF FINDING.**—In this action by vendees to recover money they have paid, on the ground that the vendor has rescinded the contract of sale, there is sufficient evidence to have justified the trial court in finding that the defendant was estopped by his own acts and conduct, especially with reference to the matters referred to in his letter regarding the placing in escrow by the plaintiffs of their quitclaim deed to the property, and hence that the defendant could not be heard to assert that the plaintiffs had not performed the conditions of the contract to be by them performed; and if this be true, the finding of the court as to whether the plaintiffs had or had not performed the conditions of the contract becomes an immaterial factor in the case. (Id.)

See Sale; Specific Performance.

VENUE. See Place of Trial.

VERDICT. See Attorney and Client, 6; Negligence, 5-7.

WARRANTY. See Sale, 14, 15.

WATER AND WATER-RIGHTS.

1. **PUBLIC SERVICE CORPORATIONS—WATER RATES—EXCESSIVE CHARGE—INJUNCTION—PLEADING—INSUFFICIENT COMPLAINT—FAILURE TO ALLEGE ESTABLISHED RATES—CONCLUSION OF PLADEF.**—In an action against a water company for damages and for an injunction restraining the defendant from shutting off plaintiff's water supply and prohibiting the collection of any rate whatsoever from plaintiff, based upon an alleged violation by the defendant of those constitutional provisions (Const., art. XIV, secs. 1 and 2), which prohibit the collection by a public service corporation of a rate for water in excess of that fixed by a city council, the fact of the establishment of legal rates was an indispensable element of plaintiff's cause of action, and where the complaint did not allege that the city council, subsequent to the year in which the alleged excess was charged and collected, passed a resolution announcing the rates for the succeeding years, claimed to be excessive, and it is impossible to ascertain from the allegations of the complaint what, if any, were the fixed legal rates for those years, a demurrer to the complaint was properly sustained. A general allegation that "during the last three years and more," the defendant has been attempting to collect

WATER AND WATER-RIGHTS (Continued).

rates in excess of the rates fixed each year, without specifying what such fixed rates were, is a mere conclusion of the pleader, which cannot be availed of to initiate and invite an issue of fact. (*Hatfield v. Peoples Water Company*, 711.)

2. **COLLECTION OF ILLEGAL RATES—FORFEITURE OF WORKS AND FRANCHISES DOES NOT RESULT FROM—INJUNCTION.**—In such a case the complaint does not state a cause of action sufficient to support a judgment enjoining the defendant from making and collecting any water rates at all for water served to plaintiff subsequent to the alleged collection of the excess rate from the plaintiff, on the theory that the mere charging and collecting of such rates in excess of those permitted by the constitution *ipso facto* operated as a forfeiture of the works and franchises of the defendant, and that, therefore, the right thereafter to collect any rates at all should be denied the defendant. (*Id.*)

See Damages; Municipal Corporations, 5-8.

WEIGHTS AND MEASURES. See Office and Officers.

WHARF. See Fixtures.

WITNESS. See Evidence.

WRIT OF POSSESSION. See Quieting Title, 11, 12.

YEAR. See Intoxicating Liquors, 1-3.



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